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COHEN.

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No. 154.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

TINE COHEN,

Defendant in Error.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. In Error to the Circuit Court for the District of Washington, Northern Division.

BRIEF OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR.

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In the Supreme Court of the United States.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. TINE COHEN, Defendant in Error.	No. 454.

Writ of Error to the United States Court of Appeals for the Ninth Circuit. In error to the Circuit Court for the District of Washington, Northern Division.

Brief of the Mutual Life Insurance Company of New York, Plaintiff in Error.

PRELIMINARY STATEMENT.

There is no difference between this case and the Phinney case so far as the acts of 1877 and 1892 are concerned, but the questions of estoppel, abandonment, waiver and rescission arise upon the facts admitted by the demurrer, and the effect of the act of 1897, and the express limitation therein to post-office addresses within the State of New York, and the effect of the bar therein are involved herein.

I.

Statement of proceedings in Court below.

This action was commenced in the United States Circuit Court for the District of Washington, Northern Division, on 9th day of November, 1898, to recover the sum of three thousand dollars ($3,000) with interest from March 5, 1898, claimed to be due on a policy of life insurance issued by the Mutual Life Insurance Company of New York (Rec., 1, 10).

The answer was demurred to by the plaintiff, and the Court sustained the demurrer to the answer and ordered judgment for the plaintiff Cohen in the sum of two thousand six hundred and seventy-one dollars and forty-one cents ($2,671.41) (Rec., 31).

The defendant excepted to the judgment. Record (31).

No opinion was rendered by Hanford, J., in sustaining the demurrer and ordering judgment.

To reverse this judgment the defendant company sued out a writ of error to the United States Circuit Court of Appeals for the Ninth District, and the judgment was there affirmed.

For opinion of Circuit Court of Appeals by Hawley, District Judge, concurred in by Gilbert and Ross, Circuit Judges (see Record, page 52. Also reported in 97 Federal Reporter, page 985).

In November, 1899, a petition for a writ of certiorari was filed by the defendant company in this Court with a certified copy of the record and brief. This petition and brief were submitted to this Court with brief for Cohen opposing application for certiorari (see papers on file).

Writ of certiorari was thereafter granted by this Court February 5th. 1900 and filed.

This cause now comes before this Court on a writ of certiorari for hearing on the merits.

II.

Abstract of the Pleadings

The Complaint.

The complaint in this action alleges that the plaintiff was a resident and citizen of the State of Washington (Rec. 2), and the application states that Cohen was in 1885 a resident of Montana (Rec. 23). That on the 10th day of June, 1885, the defendant company executed and delivered in the City of New York the policy in question, which was in favor of Mr. Cohen.

The following clauses appear in the policy set forth in in the complaint:

"If this policy shall become void all payments previ-
"ously made upon it shall be forfeited to the company," but if such forfeiture occurs after three years, then a paid-up will be issued (Rec. 3).

The following clauses appear in the application which is a part both of complaint and answer (Rec., 21).

That the application is made "subject to the charter of such company and the laws of said State" (Rec. 22).

That the policy shall constitute no contract of insurance until the policy shall have been delivered and the first premium actually paid (Rec.. 29).

Provision as to paid-up policy in case of forfeiture (Rec., 29).

> "PAYMENT OF PREMIUMS.—All premiums are due and payable at the home office of the company in the City of New York, but will be accepted elsewhere when duly made in exchange for the company's receipts signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly

waived, and that part of the year's premium, if any, which remains unpaid at the maturity of this contract shall be regarded as an indebtedness to the company on account of this contracs and shall be deducted from the amount of the claim."

That on September 21st, 1897, Cohen died in British Columbia (Rec., p. 8).

That during the lifetime of Cohen he duly performed all the conditions of the contract.

That the plaintiff had duly complied with all the conditions of the contract necessary to be complied with.

That the complaint appears sworn to the 19th day of October, 1898, and was duly filed November 9th, 1898.

The Answer.

Plaintiff in error answering admits the issuance of the policy, but denies the contract was made or delivered or the full premium paid in the State of New York, or at any other place than at Butte city, Montana (Rec., 13), and further denies that all the conditions of the contract were performed and alleges affirmatively that the application was made in the State of Montana, the policy delivered in the State of Montana and the first annual premium of $89.61 paid thereon in the State of Montana by Cohen.

That the application for said policy contained the above agreements alleged in the complaint, and also the following agreements alleged in the answer.

"2. The company does not agree to restore a policy after a lapse for non-payment of premium, but when in special cases policies are restored, satisfactory evidence of the insurable condition of the policy must be given.

"3. No policy-holder must expect to be notified when the premium will be due. It is the practice of the company to send these notices as reminders when the address is known, but no responsibility is assumed on the part of the company in consequence of their non-reception."

The answer further alleged that no premiums subsequent to the semi-annual premium of June 11th, 1892, was paid, and that the policy was by Alexander Cohen suffered to become forfeited, and to lapse.

The Demurrer.

The plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defense to the complaint. (Rec., 20).

III.

Chronological statement of facts admitted by the pleadings.

1877. Act of 1877 Passed.

1885, June 10. Cohen, a resident and citizen of the State of Montana, executed an application at Butte, Montana, to the defendant company for policy of insurance on his life for the sum of three thousand dollars ($3,000), payable to his wife, if living; if not, to children. This application was forwarded to the home office in pursuance of policies applied for by Cohen, and were issued bearing date 10th day of June, 1885, and forwarded to the home

office in New York to the agent at Butte, Montana, who delivered it to Cohen upon payment of the first premium.

June 11, 1892. Last semi-annual premium paid.
1892, Oct. 1. Law of 1892 went into effect.
1897, April 8. Law went into effect.
1897, September 21. Cohen died.
1898, Nov. 9. Suit commenced.

IV.

Statement of the Case Required by Rule 21.

The following statement presents succinctly the questions involved and the manner in which they are raised:

The first question is, whether the Statutes of New York of 1877 and 1892 applied or not to the business of collecting premiums from non-residents which are not demanded to be paid within the State of New York. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors. (See Point I.)

The second question is, whether or not under the circumstances the policy was or was not a Montana contract governed and construed by the laws of Montana alone and not by the Statutes of New York in question. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors. (See Point II.)

The third question is, whether if such premium notice statutes of New York applies their equitable and true construction aids the plaintiff in keeping the policy alive. This question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point III.)

The fourth question is, whether or not such premium notice law, as might be applicable to the Cohen policy and the premium due June, 1897, was the Statute of 1897, passed April 5th, 1897. This question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point IV.)

The fifth question is, whether or not the Cohen policy did not become lapsed and forfeited beyond any question, on June 10th, 1897, by its terms, by reason of non-payment of the premium falling due on that day, because by the express provision of the Act of 1897, no notice was necessary, as Cohen's post-office address was not in the State of New York. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point V.)

The sixth question is, whether if any statutory notice was required the sending of notice was not waived by Cohen by the terms of the policy, and whether actual knowledge of the due date of his premium, possessed and acted upon by him obviated the necessity of statutory notice. The question was raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point VI.)

The seventh question is, whether or not the policy in question was not terminated by waiver, estoppel, abandonment and rescission and the question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point VII.)

The eighth question is, whether or not it is essential to the maintenance of this action that Mrs. Cohen should have paid or tendered the premiums before suit, and should have pleaded both that fact and the Act of 1892. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon. (See Point VIII.)

V.

Statement of Questions in issue as presented in the petition for the Writ of Certiorari.

FIRST.

Whether the contract of insurance upon which the action was brought was a contract entered into and governed by the laws of Montana or the laws of New York, and whether the statute of the State of New York of 1877, 1892 and 1897 requiring notice to be given, applies to this case or at all in the States of Montana or Washington.

SECOND.

Whether actual notice on the part of the insured obviated the necessity of the statutory notice, the insured not being a resident of the State of New York.

THIRD.

Whether the parties were competent to agree, in a policy of insurance delivered and taking effect in the State of Montana, that no other notice than that contained in the policy of the due date of premium should be given or required.

FOURTH.

Whether your petitioner, being a corporation created and chartered under a special act of the Legislature of New York, was intended to be included in or affected by the said general acts of 1892 and 1897.

FIFTH.

Whether even if the Statute of 1892 applied at all it did not apply only to the premiums due respectively June 11th, 1893, 1894, 1895 and 1896, and whether the Statute of 1897 did not apply to the premium due June 11th, 1897, and whether if the Statute of 1897 applied to the premium due June 11th, 1897, there was no obligation to send any notice because Cohen was not a resident of the State of New York.

SIXTH.

Whether, in event the Statute of New York should be held to apply to this case, an action can be brought to recover the amount of the policy until payment has been made or tendered of the past due and unpaid premiums.

SEVENTH.

Whether defendant in error can plead as her cause of action the policy of insurance and performance of its terms and conditions upon the part of the insured, and after having admitted non-payment of the premiums, recover because your petitioner failed to allege the termination of the contract by giving the notice prescribed by the Statute of New York.

EIGHTH.

Whether such recovery does not constitute a fatal departure from law to law.

NINTH.

Whether defendant in error, in order to avail herself of the New York Statute, would not have been required

to bring her action within one year after default was made in the payment of premium as provided in the amendment of April, 1897, of the New York Statutes, the action having been commenced on the 9th day of November, 1898, more than one year from June 11, 1897, the last premium due date before death.

TENTH.

Whether under the charter of the defendant company and the Statutes of the State of Montana or Washington and the State of New York and the matters set forth in the record herein there is any liability on the part of the company.

VI.

Specification of Errors.

The following are the errors assigned by the plaintiff in error, and upon which it relies for the reversal of this cause.

I.

The said Court erred in sustaining the demurrer of the plaintiff and defendant in error (Assignment of Errors 1, Record, p. 32).

II.

The said Court erred in sustaining the demurrer of the

plaintiff and defendant in error to the answer of the defendant and plaintiff in error (Assignment of Errors II, Record, p. 33).

III.

The said Court erred in granting judgment in favor of plaintiff and defendant in error against defendant company and plaintiff in error for the amount of said judgment, or any sum, because it was manifest upon the issues formed in said cause that said plaintiff and defendant in error was not entitled to judgment (Assignment of errors III, Record, p. 33).

IV.

The said Court erred in not submitting said cause to trial upon the issues formed by the pleadings (Assignment of errors IV, Record, p. 33).

POINT I.

The Premium Notice Statutes of New York 1877 and 1892 never had any application to the Cohen policy, because these statutes did not apply to the business of collecting premiums outside the State of New York. The contract was not subject to these particular laws of the State of New York, because by their true construction they had no application.

The contract was made in Montana, and the insured died in British Columbia. The plaintiff was at all times a citizen, resident and inhabitant of the State of Washington (Rec., p. 2.)

It could not be claimed, if the statute expressly and on its face declared that it applied only to the business of collecting premiums in New York State, that the language of the application was intended to make the New York statute applicable to the business of collecting premiums in Montana or Washington. "Subject to the laws of said State" means only subject to such existing laws as are applicable according to their intent and true construction. The statute operates alike upon foreign and domestic insurance companies doing business within the State of New York. It must be conceded that its effect must be limited upon foreign corporations to their business of collecting premiums within this State since the business of forfeiting policies, if it be a business to make an entry on a corporation's books, could only take place out of the State at the home office of a foreign corporation. Therefore, the act must be confined as to domestic corporations, to the business of collecting premiums in New York State.

For the arguments in support of the above see Phinney Brief, Point II.

A.

The Baxter, Carter, Frommhold and Osborn cases cited by Mr. Warburton support the contention of the plaintiff in error that the Statute of 1877 applies only to the business of collecting premiums within the State of New York, and that such is the true construction of the act.

The Baxter Case. The Baxter case supports the contention of the plaintiff in error because,

1. The premiums were expressly payable by the policy in New York State, and there are no provisions for their payment in Pennsylvania. The Court will find on page 38 of the supplemental brief of the defendant in error a statement of the clause in the policy, which reads as follows :

> "This policy is a contract *made and to be exe-*
> " *cuted* in the State of New York and shall be con-
> " strued only according to the laws of that State
> " and no suit shall be brought against the company
> " upon this policy except in the Courts of that
> " State, or in the Circuit or District Courts of the
> " United States ; nor shall any such suit be brought
> " after the lapse of one year from the time when the
> " cause of action accrues.

2. No allusion whatever was made by counsel or Court in the Baxter case to the point raised here. It was evidently taken for granted in the case that, as the premiums were payable and collectible in New York State the premium notice law, of course, applied to it.

The Carter Case. We have already shown on page 61 of the amended brief that the Carter case is directly in our favor on this point. In that case the plaintiff remitted the premiums directly to the company at New York, and no question whatever was raised in the case that the New York statute did not apply under these circumstances.

The Frommhold Case. In this case the policy was issued in 1890. The defanlt was in 1894, and the Court applied the Statute of 1892. The premiums in this case were, by the policy, expressly made payable in New York, and the notices were mailed in New York. This case also is an authority in favor of the plaintiff in error.

The Osborn Case. The premiums, by the policy, were payable in New York City, and under no circumstances elsewhere. The contract in the policy on this point reads as follows:

> "The Home Life Insurance Company, by this "policy of insurance, in consideration of the an- "nual premium of $174.70, to be paid at its office "in the City of New York, on or before the 4th "day of October, at twelve o'clock noon, in each "and every year during the continuance of this "policy, until twenty annual premiums shall have "been paid, does assure the life," &c.

B.

The Statutes of 1877 and 1892 admit of the construction contended for, and indeed require it.

As we have shown in the main brief, Point II, Subdivisions 1, 2 and 3, pages 44 to 69, the operation of these statutes is necessarily limited to the State of New York.

Whenever a statute refers in general language to all persons, things or acts, two constructions of such language are always open: The words may apply to, first, all persons, things or acts throughout the State; and, secondly, all persons, things or acts throughout the world. As between these two possible constructions the presumption is always in favor of the former.

In the very recent case of State *vs.* Lancashire Fire Ins. Co., 51 S. W. Rep., 633, decided last May, the Supreme Court of Arkansas construed a statute which in general language prohibited any insurance corporation from entering into or becoming a party to "any pool, agreement or contract to fix rates" to mean any pool, agreement or contract made in that State and affecting the people of that State. In the course of its decision, the Court said:

> "Although the legislature may use general "words such as 'any' or 'all' in describing per- "sons or acts to which the statute applies, still it "does not follow that the law has an extra terri- "torial effect; for it is presumed that the legis- "lature did not intend it to have such effect unless "the language of the statute admits of no other "reasonable interpretation. The reports furnish "numerous instances of the application of this rule, "by which general words used in the statutes are

"taken as limited to cases within the jurisdiction
"of the legislature passing the statute, *and con-*
"*fining its operation to matters affecting persons*
"*and property in such jurisdiction.*"

And after citing cases in support, said:

"It is so unusual for a legislature to intend that
"its acts shall have such world-wide effect that
"Courts are never justified in putting such con-
"struction upon them, if their language admits of
"any other reasonable interpretation."

Rosseter *vs.* Cahlmann, 8 Exchequer (W. H. & G., p. 361).

In this case the Court considered a statute which abolished use of certain weights and measures, and provided that "*any* contract, bargain, or sale made by "any such weights or measures, shall be wholly null "and void."

This was interpreted to mean contracts made in England and to be performed in England, and to have no application to contracts, though made in England, which were to be performed elsewhere.

See also Merrill *vs.* Railroad, 63 N. H., 259, 265, where the Court said:

"As a consequence of the equality and sover-
"eignty of states in respect to each other, the laws
"of a state must presumptively be taken as in-
"tended for the government only of persons and
"things within its territory; and consequently,
"the operation of a law is limited to the state
"by which it was enacted, unless the intent to give
"it a more extended operation is clearly indi-
"cated."

In Whitford *vs.* Panama R. R. Co., 23 N. Y., 465, the Court construed a statute which in general words

gave a right of action to the administrator or heir of a deceased person for death caused by negligence. This law was construed to be limited to such causes of action as arose from acts negligently done or omitted within that state.

South Yuba Water Co. *vs.* Rosa, 80 Cal., 333; and
Felton *vs.* West, 102 Cal., 266.

In South Yuba Water Co. *vs.* Rosa, 80 Cal., 333, it was held that Section 299 of the Civil Code providing that *no corporation hereafter formed* shall purchase or hold property in any county in this State without filing a copy of its articles of incorporation with the county clerk, and *every corporation now in existence* must file such a copy with the clerk, etc., applied only to corporations formed or to be formed under the laws of California, and that it does not apply to foreign corporations though doing business in this State.

In Felton *vs.* West, 102 Cal., 266, the Court held that Section 726 of the Code of Civil Procedure, providing that "There can be but one action for the recovery of "any debt, or the enforcement of any right, secured "by mortgage upon real estate or personal property," etc., should be construed to mean that there can be but one action *in this State* for the recovery of any debt secured by mortgage upon property situated *within this State.*

There are two other features of the premium notice statutes which seem to require that their operation should be so limited. The *first* is a limitation as to time in sending the notes. In the acts of 1876 and 1877 the notice must be sent not less than thirty nor more than sixty days before the premium is due. In the acts of 1892 and 1897 they must be sent at least fifteen and

not more than forty-five days prior ; so that the policy-holders may only have two weeks' notice under the act of 1892. The object of the law was to afford protection to the assured by giving him notice. The purpose of the requirement was to secure to policy-holders timely notice of premiums coming due. If a notice is mailed at any time between fifteen and forty-five days before the due date, the contract rights and liabilities of the parties remain unaffected and the forfeiture results *ipso facto* from non-payment.

So far as residents of New York are concerned, the statutory requirements are reasonable, and the protection designed fully accomplished. Fifteen days is sufficient for policy-holders of New York to have notice of the date of their premium, while forty-five days' prohibition prevents notices from being sent too early to give rise to forgetfulness. As we leave New York the length of the notice provided for by the act, of course, diminishes. The statute will be satisfied, of course, by notices sent from the Home Office of the Company, but the time limit in which the statute would be operative out of the State of New York might be in many cases, entirely insufficient. In many cases, and in many localities in this country, and in all foreign countries fifteen days would not give time enough for the policy-holder to receive his notice and remit the premium before its due date.

And here the case of Colquhoun *vs.* Brooks, 14 App. Cases, 504, is relevant, where the Court held that if it could be shown that a particular interpretation of a taxing statute would operate unreasonably in the case of a foreigner sojourning in England, it would afford a reason for adopting some other interpretation if it were possible consistently with ordinary canons of construction. The machinery for notice outside New York State is not sufficient, hence not intended.

The *second* consideration is the provision in the Statutes of 1876, 1877, 1892 and 1897, that the affidavit of any Clerk authorized to mail the notice that the notice has been duly addressed and mailed, is presumptive evidence that such notice has been duly given.

If it were not for this statute the proof of service of the notice could only be made by the testimony of a witness who should be produced upon the trial and be subject to cross-examination. This, from a practical point of view, in view of the number of notices sent, &c., would be wholly impracticable.

The Courts must, therefore, either hold that this affidavit can be used anywhere and in any forum, even though it is in violation of the general rule that the Legislature of New York cannot prescribe a rule of evidence that would have any effect outside of that State, or if it holds that the affidavit is only admissible in the Courts of New York State, it would necessarily follow that this would limit the operation of the whole Statute to New York State.

In one of the cases cited by Mr. Warburton, namely, Equitable Life *vs.* Frommhold, 75 Ill., Ap., it has been held that the section relating to the affidavit has no force or effect outside the State of New York.

C.

The question is an open one for this Court.

The real character of this nest of speculative litigations is shown by the following facts :

In the Phinney case *one* premium was paid, and the insured died *three* years after policy issued.

In the Hill case *one* premium was paid, and the insured died *four* years after the policy issued.

In the Allen case *one* premium was paid and the insured died *four* years after policy issued.

In the Cohen case *six* premiums were paid, and the insured died *twelve* years after policy issued.

In the Sears case *two* premiums were paid, and the insured died *seven* years after policy issued.

In the Dingley case (just decided in the Circuit Court of Appeals for the Ninth Circuit) *one* premium was paid, and the insured died *four* years after policy issued.

In the Hathaway case (decided by Hanford, J., January 22, 1900), *one* premium was paid, and the insured died *six* years after policy issued.

The object of the premium notice statute has been variously stated as follows:

In Merriman *vs.* The Keystone Mutual Association, 138 N. Y., 116, Judge MACOMBER, at General Term, said:

> "The statute was undoubtedly passed for the purpose of requiring insurance companies to jog the memory of persons who in ordinary matters are conclusively charged with knowledge of the time when their obligations mature. There seems to be no further purpose in the enactment than that. The Legislature doubtless for a wise public policy determined not to permit a forfeiture, although accomplished by means of the terms of the contract, unless within the period named the party should be actually notified of his obligations to pay."

In the same case, 138 N. Y., 116, at p. 123, EARL, J., referring to the statute of 1877, said: "It clearly has reference only to policies where premiums or interest

become payable at stated times and the purpose of the act is to require the insurers to give the notice so that the policyholder may not lose the benefit of the policy by forgetfulness or misapprehension as to the time of the stated payments."

In Trimble *vs.* The New York Life, 55 *Pacific Reporter*, 429, the Court states:

> "And so we think that the assured must be also bound by a practical construction of the law in this case. While it is probably true that the law was made for the benefit of the assured, it was evidently intended as a reminder to him of the coming due of the premium, so that he might not unawares, or through a fault of memory, allow his policy to lapse, and forfeit his rights under the contract, upon which he had already paid out money; and when the notice which was sent in this case was received by the insured, it seems clear that the object of the law was met, and that his attention was called to the fact that the premium was about to become due, and to the further fact that, if it was not paid within a certain time, it would be forfeited. * * * The evident intention of the law, we think, however, was not to apprise him of the amount which was due, but of the time when the amount became due. While the statute was no doubt enacted for the benefit of people who insured in these cases, the law recognizing the fact that they were not people who were expert or careful in transacting business, yet it evidently was not the intention to make the law operate oppressively upon the insurance companies, but was enacted simply in the interest of justice. While Courts have always been ready to protect the assured from oppressive and technical conditions which are frequently incorporated in insurance policies, and are misleading to the untrained mind, this provision of the law does not need any strained or extended construction to effectuate that protection."

In McDougall *vs.* The Provident Savings Life, 35

N. Y., 551, the Court, in speaking of a notice mailed *prior* to the due date, says :

> "It was intended to and, undoubtedly does subserve a useful purpose, in throwing about the contract between the insurer and the assured reasonable safeguards against a forfeiture or the lapsing of the interest of the assured. * * * The notice was to remind the assured of the privilege he possessed of electing to have the contract continued and extended over the ensuing year and of the conditions of its exercise. * * * The obligation of the statute must not be unreasonably insisted upon. It provides for the giving of a notice, which shall be unambiguous and intelligible to all. * * * The statute was not meant so operate harshly upon the insurer, but to afford a protection to the assured, by the reasonable requirement of a notice, couched in plain terms, from the insurer, before the interest of the assured could be forfeited."

In Carter *vs.* The Brooklyn Life, 110 N. Y., 21, the Court says: "The act should be construed according to the popular signification of the language used and with a view to securing to policyholders and life insurance companies the benefits contemplated by such legislation."

These statutes have thus been declared to be for the purpose of preventing forgetfulness on the part of the insured, and that they should not be construed harshly or oppressively against the insurer; but under the construction of the Ninth Circuit the statute has become an engine of oppression to policyholders who have paid their premiums, and borne the burden and heat of the day, in favor of policyholders who have contributed substantially *nothing* to the fund they are attempting to divert.

The Courts of the State of New York have never sanctioned such doctrine as the above, based as it largely is upon a perversion of expressions used by the New York Courts in stating the nature of the statutes and the extent to which they control insurance contracts.

The New York cases are limited almost wholly to cases where there was a default, without notice, an improper notice, or one not sent in time, and then a death before the next premium became due.

Thus in the Phelan case the default was in December, 1882, and the death in January, 1883. In the Conway case, the default was in October, 1891, and the death was in May, 1892. In the Baxter case, the default was in August, 1884, and the death in September, 1884. In the McDougall case, the default was in July, 1888, and the death in November, 1888. In the DeFrece case, the default was in January, 1889, and the death February, 1889. In the Carter case, there was one default in 1883, and the action was to reinstate the policy.

In the main Phinney brief in Point IV, we have argued that successive defaults were not contemplated by the statute.

Had the Courts of New York decided after presentation of the proposition by counsel that the statutes were applicable outside the State of New York, and operated to continue the insurance over successive defaults, no matter what length of time had elapsed, this plaintiff in error would stand before this Court in a totally different position.

But they have not done so, and both these propositions are open ones in this Court.

We have shown in the main brief that no Court in New York has considered and decided the precise operation of the Statute of 1877 or of 1892, and we have

also shown that the decisions by the Court of Appeals are entirely consistent with the contention we make, that the operation of the Statute must be limited to the business of collecting premiums within the State of New York.

It is well settled that a decision of a Court is of no weight as an authority except upon points which were not only necessarily involved in the case, but were also considered by the Judges and made the basis of the decision.

In the case of Nickey *vs.* Stearns Rancho Co, 58 Pac. Rep., 459, decided by the Supreme Court of California, an act of the Legislature passed in 1881, was declared unconstitutional, notwithstanding that Court had in a previous case held the law valid and constitutional, and had sustained a judgment based upon it, and the Court, referring to its former decision, said: "It is of no binding force in this action, between differ-"ent parties and upon propositions neither presented "to nor considered by this tribunal in the former "action."

And here we call the attention of this Court to the fact that there is nothing in the New York decisions which bind it, as far as the question here raised is concerned.

In the case of Central R. R. *vs.* Wright, 164 N. Y., 327, it was held that the Georgia case construing a statute will not be regarded by the New York Supreme Court as controlling, when the opinions of the three Judges of the Court agree simply in the result, but no two of them concur in such construction.

So in Carroll *vs.* Carroll's Lessees, 16 How., 275, we have the familiar holding that the construction placed upon a State statute by the highest Court of that State, in a case where the decision did not necessarily involve

the construction of the statute is not binding on this Court.

There is a striking instance of the effect of the Court passing a point *sub silentio* in Cohn *vs.* Goldman, 76 New York, 284. Counsel were claiming that the Court of Appeals had already decided that a similar complaint in another case stated facts sufficient to constitute a cause of action. The Court of Appeals then says of the former case:

"The case was brought to this Court, and the judg-
"ment was here affirmed, but without written opinion.
"The printed points of the appellant presented in a
"short phrase the question of the sufficiency of the
"complaint; but we have no recollection that it was
"pressed upon us in the oral argument. We think
"that it must have passed *sub silentio*, both in the
"argument of the case and the consideration of it by
"this Court. We now feel, after our attention has
"been attracted to it, that we should disincline to hold
"as good, a complaint on such a cause of action, so
"meagre in its averments of the facts."

D.

The limitation of the scope of the Acts of 1876, 1877 and 1892 to the business of collecting premiums demanded to be paid within the State of New York, is consonant with the policy of the legislature manifested by the Act of 1897.

I.

The statute of 1897 beyond question embodies the general idea of a territorial limitation to the business of collecting premiums by foreign and domestic corporations, both controlled alike in this respect, in limiting the duty of the insurance companies to send premium notices to policy holders having post-office addresses within the State of New York. The Legislature by this statute has placed its stamp of approval upon the proposition, that all the protection it desires to give to policy holders of domestic corporations is the same protection and all the protection it can give to policy holders of foreign corporations, to wit, that residents of the State of New York or policy holders having post-office addresses within the State shall be only those who shall be entitled to receive premium notices to avoid a forfeiture of their policies for non-payment of premiums. It is, therefore, reasonable and highly probable that the Legislature by the previous statutes had the intention of limiting the duty of sending premium notices to policy holders who transacted the business of paying premiums within the State of New York. While it would not, of course, be argued that the plain language of these previous statutes was to be overridden by the declaration of a legislative policy in the subsequent Act of 1897; yet, when we find that the previous statutes referred to corporations doing business within the State; when we find that the only business that foreign corporations in connection with the subject-matter of the statute can do within the State is collecting premiums therein; when we find that the Legislature is powerless to affect foreign corporations by these previous statutes except with respect to the business of collecting premiums within the State; when we find no distinction in these previous statutes in their scope and operation with respect

to domestic and foreign corporations ; when we take in connection with all these facts the plain limitation of the Act of 1897, the conviction becomes strong that the Act of 1897 is to be considered as declaratory of the general scope and purpose of these previous statutes, to wit, a territorial limitation of their operation within the borders of the State of New York.

II.

The enactment of an explicit provision on a given subject, does not, of itself, prove that the law on that subject was different before, as such enactment may have been made in affirmance of the existing law and to remove doubts.

The inhabitants of the town of Montville v. *Houghton and another*, 7 Conn., 543.

This was a bill in chancery to obtain the correction of a mistake in a bond executed by the defendants and to compel payment of the amount due on such bond according to the condition thereof.

In decreeing the relief sought and holding a tax legally imposed prior to 1826, DAGGETT, J., speaking for the Court, said at p. 548, stating the doctrine of the case :

"It is still insisted (by the defendants) that as the legis-
"lature in May, 1826 (Stat., Vol. 2, p. 487), enacted that
"towns at their annual meetings, might grant taxes on the
"assessment list, *which should next thereafter be com-*
"*pleted by the assessors;* and also in May, 1828, vested
"ecclesiastical societies with the same power; it is to be
"inferred that taxes could not be laid in this manner
"*before.* It would be unsafe to proceed upon this idea.
"The statute might have been made in affirmance of the

"existing usage and to prevent all objection to it. If "doubts existed, it was proper they should be removed."

Nunnally *v.* White (1861), 3 Metcalfe (Kentucky), 590.

"Our opinion is that such was the rule before (the "revision of the statutory acts). So many previous rules "of law and equity are embodied in the Revised Statutes "that we cannot admit, as contended by appellant's coun- "sel, that the enactment just mentioned raises a presump- "tion that such was not the law before."

Tilford *v.* Ramsey, 43 Missouri, 410.

A statute amendatory of another and giving a right of appeal in certain cases should not be construed as showing that the right did not exist before.

POINT II.

Under the circumstances surrounding the application, issuance, and delivery of this policy in the State of Montana, it was a Montana contract, and under the true doctrine of the conflict of laws, the New York Statutes of 1877 and 1892 were not the law of this contract.

The contract was not a New York contract according to the most recent doctrines of the conflict of laws.

For the argument on this point see Phinney brief, Point III.

In the Rosson case (Appended to the Cohen Brief) the Court in California finds a contract of the Equitable Life issued under precisely similar facts—a California contract—not dominated by the premium notice law.

In the very recent case of South African Breweries *vs.* King. 2 Ch. D. (1899), KEKEWICH, J., quoting Westlake, says: "It may probably be said with truth that "the law by which to determine the intrinsic validity "and effects of a contract will be selected in England "on substantial considerations, the preference being "given to the country with which the transaction has "the most real connection, and not to the law of the "place of contract as such," and then goes on himself to say, "that seems to me as precise and accurate a "statement as one can expect to find in any judgment "or treatise, having regard to the necessarily infinite "variety of facts which require consideration in cases "of this character."

The Court held a contract made in South Africa between an English company and an English employee resident there, which contract was to be performed there, was governed by South African laws.

POINT III.

But if the Court should hold contrary to our contention in Points I and II above that the Statutes of 1877 and 1892 applied to this contract and to the business of collecting premiums outside New York State then it is submitted that the equitable and true construction of the Statute so found applicable is that the Statute operated on the first default alone without notice, and did not preserve the contract forever under successive defaults, and further that forfeiture of premiums already paid is all that was prohibited.

For argument in this point see Phinney Brief, Point IV.

POINT IV.

Should this Court, notwithstanding Points I and II above, hold that the Statutes of 1877 and 1892 governed the business of collecting the Cohen premiums, and that the operation of these statutes was not as contended for in Point III. above then

The premium notice statute, if any, applicable to the Cohen policy after April 8, 1897, was the Statute of 1897, and the policy became lapsed and forfeited on June 9, 1897, one year after June 10, 1896, the date of the last default before the passage of the act.

(*a.*) *The Statute of 1897 was applicable after April 8, 1897.*

(1.) Reason of the Act of 1897.

(2.) The existing judicial construction of the Act of 1897 and the necessity of the Court's settling the construction of the Act.

(3.) General Argument that the Premium Notice Statutes are subject to repeal or amendment as to existing policies.

(4.) Detail comparison, showing conflict between Circuit Court of Appeals in the Sixth Circuit and Hanford, J.

(5.) The question of the applicability of the Statute of 1897 to the Cohen contract is properly before this Court.

(*b.*) *The Cohen policy became lapsed and forfeited on*

June 10, 1897, one year after June 11, 1896, the date of the last default before the passage of the Act.

(1.) This construction is not retrospective.

(2.) Even if our construction is considered retrospective this constitutes no objection to such construction.

(3.) The statute bar of one year in the Act of 1897 is not a State statute of limitations, but a bar connected with the rights given by the statutes of 1876, 1877, 1892 and 1897.

(4.) Such statute bar as this is enforceable in any jurisdiction where the statute right is asserted.

a. THE STATUTE OF 1897 WAS APPLICABLE TO THE COHEN POLICY AFTER APRIL 8, 1897.

I.—Reason of the Act of 1897.

(1.) The first decision of Hanford, J., in the Phinney case was in March, 1895 (67 Fed. Rep., 492).

The affirmance on appeal was in October, 1896 (76 Fed. Rep.. 617).

The Nixon case was affirmed on appeal February, 1896 (44 U. S Appeals, 316).

These cases were, therefore, decided just prior to the meeting of the Legislature in New York in 1897.

The Hill case had also been commenced in October, 1895.

The doctrine of the Ninth Circuit was startling. The effect given to the New York statutes was wholly contrary to the principles of life insurance, namely, the law of mortality, the law of compound interest, the law of reserve accumulations.

To produce the proceeds of policies there must be combined the *payment in advance of premium*, the investment of such premium, or the portion thereof applicable, at compound interest. and this must be done under the law of mortality.

But, under these cases, all the policyholder has to do is to pay his first premium, and then, if the company, in its multiplicity of business, fails to send him a technical notice, in a technical way, abandon his policy to all intents and purposes, but secretly keep it and let the beneficiary take the proceeds, less the premiums which should have been paid.

The Ninth Circuit has violated elementary canons of construction and interpretation, for it is said that interpretation "*should lean strongly to avoid absurd conse-*" *quences, injustice, and even great inconvenience, for* "*the legislative meaning is to be carried out, and it* "*cannot be supposed to be any of these*" (Bishop on the Written Laws, Par. 82).

The Act of 1897 establishes four important propositions as the law of statutory premium notices:

1. *That notices need only be sent where there is a post office address in the State of New York.* (In this brief we have shown this was simply declaratory of the principles of the statutes of 1876, 1877, and 1892.)

2. *That default in paying premium, where notice has not been sent, will keep policy alive only one year, i. e, until next premium is due.*

(This is in accordance with our theory in Point IV Phinney Main Brief, p. 94 that successive defaults were not contemplated by the statutes of 1876, 1877, and 1892.)

3. *That any action to recover where no notice has been sent, or where there is any controversy over time or*

form of notice, or validily of claim for forfeiture, must be brought within one year after default.

4. *That the above propositions should apply to all existing and future policies.*

The statute of 1897 was thus clearly intended to meet the existing situation of "absurd consequences, injus- "tice, and even great inconvenience."

See also Main Phinney Brief, page 9.

Too great stress cannot be laid upon these absurd and unjust results, for it is in their light that the Act of 1897 is to be read. These considerations are in proper cases most pertinent in solving problems of construction, and some of the most extreme instances, like the one at bar, are the following :

In the case of Queen *vs.* Clarence, 22 Q B. D., 65, Lord COLERIDGE, C. J., forcibly says :

> "I confess that the logical deduction from the "words of the statute which has been drawn by my "learned brothers Field and Hawkins, is one "which I find it difficult logically to controvert. "But although it may perhaps not be a good "answer in reasoning, yet in such a matter as the "construction of a statute, if the apparent logical "construction of its language leads to results "which it is impossible to believe that those who "framed or those who passed the statute contem- "plated, and from which one's own judgment "recoils, there is in my opinion good reason for "believing that the construction which leads to "such results cannot be the true construction of "the statute."

See *Ex parte* Corbett, 14 Ch. D., 129.

"I think, also, there is a general rule of construction "of statutes which is applicable to this matter, namely,

"that, unless you are obliged to do so, you must not "suppose that the Legislature intended to do a palpable "injustice."

In the case of *Ex parte* Walton, 17 Ch. D., 750, a question came up as to the proper construction of the Bankruptcy Act, and speaking of it Jessel, M. R., said: "This was the object of the Legislature, and I conceive "that it was their only object; it never could have "been their intention to confiscate the property of any "man without urgent reason for doing so. A construc- "tion of the section which would lead to such a result "might well be, to me the words of Lord Wensleydale, "described as an absurdity. * * * The results of "a literal construction of the section would be so mon- "strous that such a construction must be considered "absurd."

In the same case JAMES, L. J., said: "When the "case was first mentioned to me a fortnight ago, I was "startled at the consequences which would result from "a literal construction of the section."

And he further says that the statute must be understood with a qualification "which is absolutely necessary "to prevent the most grievous injustice and the most "revolting absurdity."

In the cases before this Court we have the individual non-paying policyholder and his speculative representatives on one hand and the great body of premium paying policyholders on the other, for they are the company, and in such case it is proper to take into consideration *in re ambigua* the balance of hardship or inconvenience, and if found against the great body of members to determine any doubtful question of construction in their favor.

This was the principle in Dixon *vs.* Caledonia, 5 Appeal Cases, 827.

In Brockelbank, 23 Q. B. D., 461, the Court also said:

"In this proviso the Legislature have used language "of the widest kind—'in all cases'—so wide that, if "its full grammatical meaning be given to it, the pro- "viso will produce injustice so enormous that the mind "of any reasonable man must revolt from it. * * *

"I cannot think that the Legislature intended this. "Their language will no doubt admit of that construc- "tion, but the consequences would be so startling, that "I shrink from so interpreting it."

United States *vs.* Kirby, 7 Wallace, 486: "All laws "should receive a sensible construction. General "terms should be so limited in their application as not "to lead to injustice, oppression, or an absurd conse- "quence. It will always, therefore, be presumed that "the Legislature intendeds exception to its language, "which would avoid results of this character. The "reason of the law in such cases should prevail over "its letter."

"That construction which will produce a conse- "quence so directly opposite to the whole spirit of our "legislation ought to be avoided, if it can be avoided "without a total disregard of those rules by which "courts of justice must be governed."

Post Master General *vs.* Sorley, 12 Wheat., 146.

In Cohens *vs.* Virginia, 6 Wheaton, MARSHALL, C. J., said:

"The mischievous consequences of the construction "contended for on the part of Virginia, are also en- "titled to great consideration."

And in Sturges *vs.* Crowninshield, 4 Wheaton, 203, the same Chief Justice said: "But if, in any case,

"the plain meaning of a provision, not contradicted by "any other provision in the same instrument, is to be "disregarded, because we believe the framers of that "instrument could not intend what they say, it must "be one in which the absurdity and injustice of apply- "ing the provision to the case, would be so monstrous "that all mankind would, without hesitation, unite in "rejecting the application."

People *vs.* Jaehne, 103 N. Y., 182.

"It is the duty of courts in construing statutes, to "avoid, if possible, a construction which leads to ab- "surdity or manifest injustice, and the case before us "calls for the application of this principle."

(2.) **The existing judicial construction of the Act of 1897 and the necessity of this Court's settling the construction of the Act.**

The doctrines of the Sixth Circuit in the Rosenplaenter case support the above four propositions respecting the Act of 1897. The Rosson decision of the Court in California supports the first proposition.

The Supreme Court of New York in the Schuell case (See Appendix to Cohen Brief) followed the doctrine of the Rosenplaenter case applying the law of 1897 to existing policies, and deciding that the law of 1897 did not give the assured one year after default to make payment, if there had been notice.

In the Hathaway case (Exhibi C) a premium became due in January, 1898, after the passage of the Act of 1897, and Hathaway died over a year after its passage and no suit was begun

until two years after its passage and yet Hanford, J., finds, on what we think unsound reasoning, and in absolute and direct conflict with the Sixth Circuit; that the act of 1897 does not apply, notwithstanding that the acts of 1876, 1877 and 1892 have always been construed to apply the burden of the Act to the companies as to existing policies. HANFORD, J., says of the act of 1897 "there is no express declaration "in the statute making it applicable to policies which "were issued prior to the amendment."

In the Dingley case, against this plaintiff in error, decided in February, 1900, in the Circuit Court of Appeals, and in which case application is to be made in this Court for a writ of certiorari *one* premium was paid in 1892, and none afterwards and suit was not begun until September 31, 1897, and yet the plaintiff was given judgment for $75,000. Truly this is practical spoliation through erroneous construction of statutes, and deprivation of property without due process of law, for the construction of the acts of 1877 and 1892 in the Phinney case and the proposed construction of the act of 1897 in opposition to the Sixth Circuit, the California Court, and the New York Supreme Court amounts practically to such a result.

In the Hathway case the opinion was delivered January 22, 1900, the day the Phinney case was argued in this Court, practically nullifying, so far as the Court could do it, the New York Statute of 1897, and with the result of further legalizing the obtaining of insurance moneys for nothing under the forms of law, thereby taking what belongs to other policyholders who have paid their premiums.

The State Court in Oregon, the California Court, the Supreme Court in New York and the Circuit Court of Appeals in the Sixth Circuit have held the acts

of 1892 and 1897 applicable after their passage to all policies.

The same Court which decided the Phinney case (Hanford, J.), has decided contrariwise, that the acts of 1892 and 1897 do not apply to all policies. This serious conflict, with its attendant confusion of the rights of policyholders, is now before this Court.

3. General argument that the Premium Notice Statutes are subject to repeal or amendment as to existing policies.

(1.)

Failure to give the statutory notice does not operate as a payment of the premium, nor does it relieve the insured from the obligation to make payment of premium. At some time every premium named in the policy must be paid if recovery is had. If the payment is not made when the premium becomes due or by the insured during his life, it must be made when the insurance is collected and all courts have allowed interest on unpaid premiums from their respective due dates. None of the courts have held that failure to give notice liquidated unpaid premiums; none have held that the obligation to pay the premiums was destroyed by failure to give the statutory notice or that the premiums did not become due, even if the notices were not given. The only difference of judicial opinion has been as to when payment or tender of premium should occur in case of recovery, provided the statutory notice had not been given. Technically and logically we think it is admitted by the courts that the premium should be

paid or tendered before action is commenced to recover upon the policy, but because it would in some cases be burdensome and in all comparatively useless to make payment of premiums in advance of the action and recover the whole amount of the policy, when by offsetting the premiums against the policy the same result would be accomplished, it has been held contrary to our view of the settled law applicable to this case that such payment or tender was not required; that the short cut method of equitable application reached the same end.

(2.)

Keeping in mind the fact that payment of premiums is indispensable, whether made before or concurrently with a recovery on the policy, we approach a discussion of the legislation of the state of New York of April, 1897, and of the questions whether it applies to policies antedating its passage, and whether the statute in force at the time the policy was entered into or that in force at the time the premiums become due or remain unpaid, is the one to be applied. If the contract is complete in itself, regardless of the statute, and the general policy of the state is merely expressed through the statute, then we think the legislature is at liberty to alter or repeal the statute in its discretion, and the parties to a contract of insurance are in no condition to complain. The only complaint one insured could make, would be that he was relegated to the duty of performing his contract in the terms he had made it. His express agreement was that he would pay the premiums upon his policy annually or semi-annually, at the beginning of each insurance period, or in case he failed to do so, his contract of insurance should be terminated. His complaint must come outside of the contract in case

of the repeal of the statute, and rest in this fact; that the insurance company was permitted to successfully defend because of his violation of the contract. In all judicial opinions construing the New York statute and its amendments, they are regarded as regulating statutes; as statutes of public policy and merely affecting the remedy. It is not that the courts wish to aid and encourage a dishonest person in a particular instance to cheat an insurance company and obtain insurance he has not paid for — simply because the statutory notice has not been given him (although fully and intelligently informed of every fact the notice could impart), but while having an honest contempt for the dishonest practice in a particular case, nevertheless, giving it the advantage of the statute in order that protection may be afforded a large body of policyholders against their own carelessness, inadvertence and ignorance. In other words, the statute confers no vested right upon any individual policyholder, but extends protection to a large class of insured persons from the consequences, through unmindfulness, of violating their express contracts. If experience should satisfy the Legislature that such a statute does not promote the end designed, or that it is unwise or inexpedient, that body is at liberty to alter or abandon its policy. The insured or his beneficiary has no ground of complaint of the legislative action for the obvious reason that the repeal of the statute leaves the obligation of his contract untouched. In fact, the repeal of the statute validates and reaffirms the contract in the language and stipulations of the parties to it. The repeal of the statute affects only the policy of the state; so far as the parties to a particular policy of insurance are concerned, its effect is simply to open the doors of the courts to the insurance company to defend

against recovery on a violated policy upon the ground of breach on the part of the insured, which before, without giving the statutory notice, it was not permitted to do.

(3.)

If the foregoing propositions are correct, namely, that the failure to give the notice does not pay or discharge the premiums or impair the obligation for their payment; and the statute prescribing notice is one of state policy and regulaion—subject to amendment or repeal at any time—then we think it follows that the statute in force at the time the premium falls due or remains unpaid, controls. The insured cannot control the discretion of the legislature in altering or repealing a statute expressive of its views of policy, and therefore holds his policy with the understanding that such a statute is liable to amendment or repeal at the legislative pleasure. If the amendment or repeal takes effect before a particular premium falls due, the insured must see to it that he makes payment of that premium as he has agreed to do, or suffer the agreed consequences of his breach of contract. If he is in arrears in payment of other premiums when the law is amended, repealed, he must likewise know that unless he makes payment of such defaulted premiums the same consequences follow.

Such is the reasoning and conclusion in the case of Rosenplanter *vs.* Provident Savings Life Assurance Society in the 91st Fed., 728, and as adopted and approved in the same case in the Circuit Court of Appeals, 96 Fed., 722. The facts in that case were fully set forth in the complaint, and their sufficiency tested by demurrer, the Court adopting the view that the policy was a New York contract and specifically provided that "at

all times and places" it shall be construed to be a contract made in the city of New York. It was averred the policy was executed and delivered April 1st, 1889, when the statute of New York of 1877 was in force. The Court assumes this contract was within the meaning and under the protection of chapter three hundred and twenty-one of the laws of New York of 1877. The declaration avers the semi-annual premium of April 1st, 1889, was paid, as were also those of October 1, 1889, April 1, 1890, October 1, 1890 and April 1, 1891, but the insured did not pay the semi-annual premiums falling due October 1, 1891, April 1, 1892, October 1, 1892, April 1, 1893, October 1, 1893, nor April 1, 1894; and that the insured died September 5, 1894, leaving the six semi-annual premiums due and unpaid. The averment as to notice showed that the statute of New York had not been complied with and hence the notice was of no effect. If the statute of 1877 remained in force, the notice was indispensable. But if the act of 1877 had been repealed by the act of May, 1892, it was held no notice was required because the policy being for the term of one year was excluded from the application of the statute of 1892, though embraced within the provisions of the act of 1877. It is thus seen that under the act of 1877, in existence when the contract of insurance was entered into, the policy could only be terminated by giving the statutory notice whereas under the act of May, 1892, notice had been entirely dispensed with. The vital question in the case then was: Was the legislature without the power to repeal the statute requiring notice, and leave the insured and his beneficiary to the consequences of a violation? Judge HAMMOND in meeting this contention in the Circuit Court says:

"I cannot assent to this. If the provisions of

the statute as to notice had been written in the policy as agreements of the parties, that would have been their contract, and, of course, the law could not make another contract for them, wherefore it would be enforced by the courts as the agreement of the parties. But the statute did not undertake to make a contract of insurance for the parties. It was only a statuto·y regulation for the government of insurance companies, compelling them to give notice as required by the act, of the non payment of premiums, before they would be allowed to declare a policy forfeited, according to its stipulations. It was a regulation that the legislature had a right to make. It was a beneficent regulation for the relief against a forfeiture created under the contract which it was entirely competent for the legislature to withdraw, alter or amend, as to it might seem best. Surely, if we turn the principle contended for the other way, its operation would be denied by the plaintiff and her counsel; that is to say, if an insurance company should contend that at the time of the passage of the act it had already issued a policy defining the terms of forfeiture, and that it was not within the power of the legislature to impair the obligation of that contract, by importing into it a different stipulation or provision as to the conditions of forfeiture, the beneficiaries would deny that such legislation unconstitutionally impaired the obligation; but, if the legislature has the power to import into an existing contract such a regulation for giving notice without impairing the obligation of the contract as to the insurance company, it has the right to take it away by repeal, without impairing the obligation as to the beneficiary."

The Circuit Court of Appeals adopts this reasoning and this language in meeting and overcoming the same contention, and supplements the reasoning as follows:

"The contract which the parties themselves made was one for an insurance for a single year,

with the privilege of renewal for succeeding years upon condition of the payment of an additional premium upon the day named in the policy. Failure to renew it according to the condition of the contract put an end to the policy, without more ado. So with respect to the payment of the second half of the yearly premium. If not paid when due, the contract was thereby terminated. The act of 1877 interposed, and for the benefit of the insured provided that the stipulations of the contract in respect to the termination of the policy should not be enforced unless notice of a certain character had previously been given by the insurer. The statute did not provide that the interest of the insured shall not be forfeited upon failure to renew the policy by the payment of the stipulated premium, but that the forfeiture should not be declared or be effective unless the default in the payment of the stipulated premium should occur after a particular notice had been given prior to the stipulated day of payment, or a default should continue after a particular notice and demand for payment had been given. Thus the law stepped in, and in effect said: 'You shall not enforce the stipulations into which you have entered in respect to the effect of a default in payment of premiums, unless you first comply with this statute by giving the notice herein required.' The subsequent repeal of this statute does not impair the obligation of the contract in respect to premiums which should mature thereafter. The repeal simply permits the contract into which the parties have entered to be enforced according to its own terms and conditions."

The Circuit Court of Appeals, in its opinion, cites Ins. Co. *vs.* Cushman, and this last case is cited in City *vs.* New Orleans, 157 U. S., 224, where Mr. Justice HARLAN says:

"One who engages by contract to do a certain "thing, cannot claim that the obligation he has "assumed is impaired by legislation that is de-

"signed only to enforce performance of his obli-
"gation."

If the companies cannot complain of the burden, the policy holder cannot complain of its modification.

In Campbell *vs.* Holt, 115 U. S., 627, the principle is stated:

"In all this class of cases the ground taken is that
" there exists a contract, but, by reason of no remedy
" having been provided for its enforcement, or the rem-
" edy ordinarily applicable to that class having, for rea-
" sons of public policy been forbidden or withheld, the
" legislature by providing a remedy where none exists, or
" removing the statutory obstruction to the use of the
" remedy, enables the party to enforce the contract, other-
" wise unobjectionable."

The legislation of 1897 removes the statutory obstruction to the forfeiture.

The same principle is found in Smoot *vs.* Building Co., 95 Va., 686.

"If a corporation may be denied the right to plead usury as to existing contracts, is it a greater stretch of authority upon the part of the legislature to create a corporation to which individuals may by their voluntary contracts bind themselves to pay more than the rate of interest allowed by law? In the one case the legislature was held to have the power to deprive corporations of a right conferred by existing law; in the other case the power of the legislature is invoked to remove a disability to contract which it had imposed.

Statutes which validate contracts, otherwise invalid, are sustained when 'they go no farther than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some

legal formality, *or in consequence of someingredient in the contract forbidden by law.*'

Cooley on Con. Lim., 6 Ed., p. 460."

It is thus demonstrated by these opinions that the legislature may entirely repeal the statute in force at the making of the contract and throw the parties back upon the terms of that contract without the violation of any vested right, and had done so by dispensing with the notice which was required when the contract of insurance was entered into. If it was within the legislative competency to take away from a policy holder all the protection of the act of 1877 by that of 1892, it was and is equally within its authority to remove, alter, modify or limit the protection afforded by the statute of 1892, which was done by the act of April 8th, 1897. The act of 1892 was obliterated and merged in that of 1897, just as that of 1877 had been in the Act of 1892. A cause of action or defense given by a statute founded on grounds of public policy conferred no vested right which could not taken away by a similar statute, and a repeal of a law which gave such right of action or defense, terminated all claim to such recovery or defense, although the contract was made previously.

Washburn *vs.* Franklin, 35 Barbour, 599.

The act of 1897 provides

> "No action shall be maintained to recover under a forfeited policy unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued."

In the case of Caroline L. Hathaway and Horace C.

Hathaway *vs.* The Mutual Life Insurance Company, decided January 22nd, 1900, in the Circuit Court for the District of Washington, Judge Hanford finds that the policy of insurance upon the life of Homer M. Hathaway was delivered and the first premium paid January 26th, 1892 ; that annual premiums were to be paid January 26th in each succeeding year during the continuance of the policy ; that the premium falling due January 26th, 1893, and each succeeding year to the death of the insured, were not paid ; that Hathaway died April 15th, 1898 ; that the action to recover upon the policy was not instituted until the 5th of April, 1899. He stated in the opinion that when the contract of insurance was made the statute of New York of 1877 was in force, and that the policy in its inception was under the protection of this statute. He finds as a fact in the case that by the express terms of the contract no notice was required to be given as to the due date of premiums other than the contract itself recited of when they fell due and an express waiver of any further notice whether required by statute or otherwise than as contained in the policy. Judge HANFORD states :

> " It is my opinion that the rights of the parties under the policy of insurance in suit were not affected or changed by the new legislation of 1892. Conceding that the statute of 1877 prescribing the notice to be given was repealed, still there was no interval of time intervening after the repeal of that law, and before the substituted section became effective within which the insurance corporation claimed a forfeiture of the policy for non-payment. The policy cannot be forfeited for non-payment of premium until thirty days after the mailing of the prescribed notice. In the year 1897 the law was again amended and section ninety-two of the law of 1892 which saves life insurance policies from

forfeiture for non-payment of premiums unless the prescribed notice shall have been given, was re-enacted, but with such a change of phraseology as to change the effect so as to only save policies from forfeiture for a period of one year after a premium has been due and unpaid, and with an additional provision barring actions on policies after the lapse of one year from the date of the payment of any premium."

In meeting the reasoning of the Rosenplanter cases, Judge HANFORD says the questions involved in the Hathaway case and the other cases enumerated, determined in the Ninth Judicial Circuit, are entirely different from the main question decided in the Rosenplanter case, and gives his concurrence to the opinions in the latter case as follows:

"I feel entirely free to concur in the opinions in the latter case and I assent to the general proposition that existing rights which do not rest upon agreements of the parties nor upon any consideration of value received, but only hang upon arbitrary provisions of paternal statutes, may be cut off at any time by act of the legislature which created them without impairing the obligations of contracts, but to cut off existing rights the act must contain explicit declarations of its purpose to cut them off or its provisions must necessarily cut them, as would be the case where the statute upon which they depend is repealed, without a saving clause. The courts will not presume that a new statute was intended to cut off any existing right when there is no express declaration of such intention, for the reason that it is contrary to the policy of our government to construe statutes so as to make them operate retro-actively. In the Rosenplanter case the policy under consideration was a term policy and expired by its own limitations, unless it was renewed by the omission of the Insurance Co. to proceed according to the provis-

ions of the act of 1877, to effect its forfeiture. It was not kept alive by the statute of 1892, because it belonged to the exempted class, and it was not protected by the Act of 1877, after the repeal of that act."

We respectfully submit that Judge Hanford draws a mistaken conclusion from the premises he assumes. He concurs in the reasoning of the Judges in the Rosenplanter case and allows his difference in conclusion from those cases to depend too much upon the accidental fact of the insurance being for a shorter term in the one case than in the other. Now, it being admitted that the one year term is under the protection of the act of 1877 as well as policies for longer terms, then no right of repeal of the statute can be found in the one instance that does not equally apply to the other. In the Rosenplanter case the power of the legislature is not measured by the term of the policy, but by the ample and complete legislative authority to repeal the statute relating to notice as applied to all policies. This reasoning, Judge Hanford concedes to be sound, and the power of the Legislature is admitted, to take away all protection. The infirmity, we think, in Judge Hanford's reasoning, is in unconsciously carrying the idea of vested rights in the provisions of a regulating statute and allowing what seems the smallness of a one year policy to afford ground for one construction of the statute, which would not be justified in applying the same statute to a policy of longer term. He states that, by its own limitation, the contract in the Rosenplanter case would expire before the protection of the statute, which is equally true of the case he is passing upon. Unless the premium is paid by Hathaway on the 22nd day of January after the delivery of the policy and each succeeding January thereafter, by its own express terms,

that policy falls. The Rosenplanter policy is one antedating the statute of 1892, just as is the Hathaway policy. Judge Hanford says of the Rosenplanter policy, it was not kept alive by the statute of 1892, because it belonged to the excepted class, and it was not protected by the act of 1877 after the repeal of that act.

If Judge Hanford is in error as to the statutes of 1892 and 1897 having no bearing on policies in existence prior to their passage, then we would adopt the conclusion of the judges in the Rosenplanter cases. Those judges found the statutes applied to all policies, those in existence as well as those afterwards to be entered into.

The following are the structural and declaratory parts of Section 92 of the Act of 1897:

> "No life insurance corporation doing business in this state shall within one year after the default of payment of any premium *declare forfeited or lapsed* any policy hereafter issued or renewed. * * * * *Nor* shall any such policy be *forfeited or lapsed* by reason of non-payment when due of any premium * * * within one year from the failure to pay such premium * * * unless a written or printed notice * * * shall have been duly addressed and mailed to the person whose life is insured. * * * If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken *to be a full compliance* with the requirements of the policy in respect to the time of such payment * * * no action shall be maintained to recover under a forfeited policy unless the same is instituted within one year from the date upon which default was made in paying the premium * * * for which it is claimed that forfeiture ensued."

There are two grounds for bringing the Cohen policy within the operation of the Act of 1897.

The *first* is that as the policy was issued in 1885, it is covered by the words "hereafter issued or renewed" in the Act of 1897, which relate back to the Act of 1876, where they first appear in this continuous body of premium notice statutes.

This is in accordance with the well-settled principle of Ely *vs.* Houlton, 15 New York, 595, where it was held that the effect of an amendment to a statute, made by enacting that the statute, "is amended so as to read as follows," and then incorporating the changes and additions, with so much of the former statute as is retained, is not that the portions of the amended statute which are merely copied without change are to be considered as having been repealed and again re-enacted, but that the new provisions, or the changed portions, should have been deemed to have been the law at any time prior to the passage of the amended act. The part which remains unchanged is to be considered as having been continuously the law from the time of its original enactment, and the new or changed portion to have become law only at and subsequent to the passage of the amendment. This was applied in Matter of Warde, 154 New York, 342.

In this case the words "has already begun" in an amendment did not have the effect of making the words refer to the date when amendment took effect, but left them continuing to speak as of the date when they originally went into effect.

So in Stevenson *vs.* Brewing Co. *vs.* Eastern Co., 22 App. Div., 523, where a statue of 1833 provided for refiling a chattel mortgage saying: "Every mortgage *filed in pursuance of this act, etc.*" This was amended in 1895 by requiring a change in the statement, and the Court said: "It is insisted by the learned counsel for the plaintiff

that the statute as thus amended is applicable only to mortgages subsequently made. It is true that an amendatory statute does not have an retroactive effect, when it appears that such was the legislative intent.

* * * * * * *

"The application of that principle in the present case does not exclude from the effect of the amended statute that which is required to be done subsequently to continue the validity of the mortgage as against the creditors of the mortgagees. Said application is prospective. It may, in a case like that in question, be unfortunate to have an act take effect so recently that a party may not be advised of its provisions, what he is legally required to observe, and for failure to do so is subjected to prejudicial consequences."

The Cohen policy was "hereafter" issued, that is after the act of 1877 so that under this doctrine there is no question of the applicability of the act of 1897.

The *second* consideration involves the meaning of the word "renewed" read in the light of the existing situation.

It is apparent that this statute applies mainly and at all events to two kinds of policies, namely: a first kind, policies "hereafter issued," that is, to future contracts of insurance. But the legislature did not stop here irrespective of the principle stated above. The policy of the law and the import of its provisions were required for the protection of those who held policies at the time of its enactment, as well as those who might thereafter have policies issued to them. So the legislature provides for a second kind of policies, and policies which had been issued prior to the enactment of this statute, but which would be "renewed" afterwards. It must be conceded the legislature could not provide protection to policies which had gone out of existence—had become void and ended—

because that would be beyond legislative power. If the policy had ceased to be a contract then only the parties could readopt it, or, more correctly speaking, they alone could make a new contract by their mutual consent, recreating and continuing the old contract as their new contract. If the contract had gone out of existence, it would be a solecism to say the legislature could bring it into being again. It could no more do so than it could make any other contract for the parties. Now the legislature must be conceded to be dealing with something else than a dead contract when it regulates the conduct of parties toward each other in a contract to be "renewed." It therefore, in making regulations for policies "hereafter renewed," is dealing with contracts in existence—in life ; that is, its regulations must pertain to such policies as are contracts. To renew an existing contract is to feed it, to continue it, to refresh, to reinforce, to strengthen it. It is not to perform the legislative miracle of raising a dead contract from the grave. So that on the one side the policy "hereafter renewed" is not one to be issued in the future, because that has already been provided for ; and on the other hand, it is not to bring back from the realm of dead contracts the contract which has ceased its existence. Hence the legislature must have had in contemplation such policies as are yet alive, but liable, for lack of some protection or performance or observance by the parties, to become terminated ; and by this course of reasoning we are forced to that class of contracts that may be continued by performance of condition on the one side, or expire or terminate from lack of such performance, and that is the policy where the holder or beneficiary pays his stated premium and has the insurance up to a given time with the privilege of paying the second installment of premium and renewing his contract from premium

period to premium period until the end of the insurance term is reached. In other words, the policy or policies "hereafter renewed" are the policies in existence at the time the law was passed, and were to be kept alive by the performance of the express condition of the policy in paying the periodic premiums. This interpretation makes the law harmonious and attributes to the legislature the wisdom of applying the general policy it has adopted to all persons similarly situated, and not selecting one portion for its protection or favor and leaving the other without such protection or care. We think this section demonstrates that such is the meaning of the legislature, because it provides that if the prescribed notice is timely given and the policy holder comes in "Within the time limited therefor" and makes payment, such payment shall be taken to be a compliance with the requirements of the policy. In other words, the policy, if payment is made within the prescribed time, is "renewed." It holds it in life until thirty days after notice of the due date of the premium and provides that payment within that time shall operate as a compliance with the contract, or as a renewal of the contract, and continue it in being for another premium period. This is the interpretation placed upon this term from its use in the original act by the courts of the state of New York. It was made very clear when brought to the attention of the Court of Appeals of New York in the early case of *Carter* v. *Brooklyn Life Ins. Co.*, 110 N. Y., 15 (17 N. E., 396). That Court says, in construing this expression:

> "We are also of the opinion that the payment of each annual premuim constituted a renewal of the policy within the meaning of the term "renewed" as used in the act. While it was provided by the policy that it should continue for the term of the natural life of the insured, it was expressly

provided that this was upon the condition that he should pay the annual premiums as they became due by the terms of the policy. A failure to pay such premiums in any year was declared to render the policy null, void, and of no effect; but, when paid, it continued, by force of such payment, the policy in existence for the period of another year. This process each year revived or renewed the policy as it approached the period of its agreed termination. It is not according to the popular notion of the meaning of the word "renewal" that it can take place only after the death or expiration of the subject to which it is applied. Thus to renew a note, a lease, or a contract, it is not essential to wait until they have respectively expired; for, after that time, it would be practically impossible to renew them. A new note or lease may be made or contract created, but they would have force and effect from the new creation, and not from the original agreement. To renew, in its proper sense, is to refresh, revive, or rehabilitate an expiring or declining subject; but is not appropriate to describe the making of a new contract or the creation of a new existence. Webst. Dict.; Worces. Dict. It would be at the option of an insurance company to re-execute a forfeited contract of insurance; and, if the act was held applicable to such a policy alone, it would confer no legal right whatever upon a policy-holder. It was the evident object of the act to make it apply to some existing policies, and confer some legal right upon their holders, to avoid a cause of forfeiture; and, if it be held to apply only to lapsed policies, it leaves it entirely optional with the company whether there should be any renewed policies thereafter or not. We are therefore of the opinion that the plaintiff's policy was renewed within the meaning of the act" (p. 399).

The act of 1897 thus clearly applied to a policy like that of Cohen and Hathaway. Taking it that policies of this character are within the law, has the

statute been observed so as to entitle a recovery? The statute very clearly declares that the policy shall not be forfeited or lapsed; that is, it shall not be terminated, *within one year* from the due date of a premium on account of failure to pay the premium, unless the notice is given. Of course if the notice is given and the premium is not paid the policy terminates at the expiration of thirty days from the notice of the due date of the premium, but if it is not paid and the notice is not given, then it does not terminate through failure to pay *within one year* from the date when the installment or premium became due; but if the year *goes by* and no such payment is made, then the policy does terminate and the express stipulations of the parties that it shall terminate, are left unhampered by legislative restriction, and that period of time elapsing without payment makes a termination and ending of the contract by the express agreement of the parties to it.

Opposing counsel have attempted to give an unwarranted effect to the clause in the application that it is made subject to the charter of the Company and the laws of the State of New York. Even if this clause could operate to make the New York statute applicable as it might exist at the time, the contract would be subject to the statute as it might be amended from time to time. There is in this application no agreement that any specific statute shall be a part of the contract. It is simply made subject generally to the statute. The policy-holder must pay year by year and each year the statute then in force controls. We have already claimed in our main brief, at page 70, that the company in any event can only be considered to have contracted to send notice if the law requires it; if not required, then the company does not contract to send it.

The application is made subject to the charter. It certainly could not be claimed that the provisions of the charter which existed at the time of the Phinney policy could not be amended or modified in any way during the life of that contract. The clause simply meant that the application was made in harmony with and not in contradiction of, and subject to whatever might be the charter of the company and the statutes of the State, whether then existing or as amended from time to time, for the Legislature of the State of New York has always had full power to amend the charter of the company and the act of 1877.

It was not meant that the policy holder and the company contracted that the laws of New York then in existence should always govern the contract irrespective of whether those laws were amended or repealed. The parties could not oust in this way the jurisdiction of the Legislature of the State of New York over the contracts of the company. Such was not plainly the intent of the parties. The intent of the parties was simply to declare that in dealing with each other they dealt subject to the laws of New York as they might then exist or from time to time be amended or repealed.

In the Rowe case (42 N. Y. Supplt., 646) the policy was issued in 1863 and the Court said, "Inasmuch as "this policy was renewed after the passage of that "statute (1876 as amended by the statute of 1877) it ap- "plies to the policy in suit" and refers to the Carter case. The law of 1877 was applied to this contract and not the law of 1876. It cannot be claimed that the payment of at least one premium after the passage of the act of 1876 is necessary to bring a policy within the operation of the statute. The payment of the premium is a voluntary act on the part of the policy holder with which the Company has nothing to do. It cannot be

that whether the burden of notice can be thrown upon the Company depends upon the will of the policy holder. That would not relieve the statute from the objection that it impaired a contract as against the Company. It is too narrow a view of the word "renewed" which must mean "to be renewed," that is, the statute applies to all policies thereafter issued, and to all premiums due and payable thereafter on existing policies which are "to be renewed."

Thus in Head *vs.* University, 19 Wallace, 530, the plaintiff was elected a professor to hold his office "subject to law," and this Court said "when it was, "at the same time, declared that this position should "be held by him for six years, 'subject to law,' it "cannot be doubted that he understood it to be a part "of the contract that the legislature could, at their "discretion and in their pleasure bring it to an earlier "end," and

"The plaintiff accepted his office subject to the laws "then in existence, and subject to the passage of "such subsequent laws as should seem wise to the "legislature."

No Court has ever held to the contrary of the above. The proposition that the law in existence at the time the contract was issued controls such contract forever is a proposition for which there is no support in any of the premium notice cases and it is based upon a misuse by counsel of the language in some of these cases. For instances, the language in De Frece *vs.* Insurance Co., 136 N. Y., 144, where the Court says: 'The contract is to be read as if the act of 1876 had been literally incorporated into it" When the New York Court of Appeals made this statement and other similar statements it did not have before it any question whatever of the effect of an amendment of the statute.

In fact, in some of those cases the rule we contend for is hinted at even when no such question was before the Court. Thus in the Baxter case, 219 N. Y., 450, the Court says:

> "The policy itself contained the stipulation that it was a contract made and to be executed in the State of New York and construed only according to the laws of that State. Aside from the provisions of the policy, and under general rules of law, the contract was subject to the terms and conditions expressed in Chapter 341 of the Laws of 1876, as amended by Chapter 321 of the Laws of 1877. This statute was a part of the contract in question and governed the rights and obligations of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

This is nothing more than saying that so long as the statute is in existence it controls the policy. The same idea is found in the Griesemen case (10 Washington).

In the same way in the Pollard case (26 Southeastern, p, 422), quoted by opposing counsel, the Court says:

> "It (the statute) is therefore as much a part of every contract of life insurance governed by the laws of the State of Ohio and made after that statute was passed, as if incorporated in it; the general rule being that laws in existence are necessarily referred to in all contracts made under such laws," &c.

It may very well be that in the case of a New York policy the premium notice statute controls the provision of such policy, but it would control it whether there was any clause in the application or policy or not. We have already contended that the clause in the application in the Phinney policy did not in any way make the

Phinney policy subject to the premium notice law of New York, because that premium notice law did not apply outside of the State of New York, and the statute is to be read just as if it so expressly stated. It could not be claimed that the clause in the application was intended to make a New York statute applicable to the Phinney contract which on its face did not apply, but was only intended to make the charter of the company and such statutes of New York as were applicable govern the policy. No argument, therefore, can be drawn from the clause in the application and the language in the cases referred to that the Acts of 1877 and 1892 could not be amended or repealed as to existing policies.

(4.) Detail comparison showing conflict between Circuit Court of Appeals in the Sixth Circuit and Hanford, J.

There have been four decisions directly involving the question under consideration:

(1.) The case of Rosenplanter *v.* Provident Life, 92 Fed. Rep. 728, opinion by Hammond, J., affirmed 96 Fed. Rep., 721, opinion by Lurton, J., concurred in by Black and Thompson, JJ., decided that the act of 1892, and not the act of 1877, governed the premium notices after October 1, 1892, on a policy issued in 1888.

In the Rosenplanter case (see opinions annexed hereto as Exhibits A and B. The Court is referred to these opinions for full arguments upon the applicability of the Actof 1892 after Oct. 1, 1892) the policy was issued April 1, 1889, at which time the statute of 1877 was in force. *The Court held that the policy was at the time of its issue within the meaning and protection* of the statute of 1877.

Premiums were paid in 1890, and in 1891 up to April 1 1891, but not paid thereafter, or in 1892, 1893, or 1894, and the insured died September 5, 1894.

After reviewing the act of 1877, the Court says:

"But for the *subsequent act of May 18, 1892*, there "would be no serious doubt that this policy was in force "at the date of death of the insured, no effectual "statutory notice having been given."

The statute of 1892 excepts from its operation any policy which is "a term insurance contract for one year or less," and such exception did not exist in the statute of 1877.

The Court then proceeds to hold that the Rosenplanter contract was a term insurance contract for one year or less, and that after 1892 no notice had to be sent, although previously required, as to this statute of 1877.

The Court will observe from this statement, and from the opinion of Judge Hammond (Exhibit C), that the doctrine of the Rosenplanter case is that under the statute the failure to send a notice *does not relieve the insured from the contract obligation to pay future premiums, but* the statutory requirement as to notice and the effect of the notice statute upon the rights and liabilities of both parties depends upon what that statute is at the time each premium becomes due. In all these premium notice cases the *premiums due up to the date of death are deducted* (see Exhibit C, *ad fin.*). This can only be on the theory that failure to send a notice one year does not relieve the insured from future premiums.

In the Rosenplanter case no semi-annual premium was paid in October, 1891, nor April, 1892, nor in October, 1892, and at these dates the statute of 1877 required notice, so that, while the policy had not lapsed in October, 1892, the insured being still alive, there was the obli-

gation to continue to pay. On October 1, 1892, the act of 1892 went into effect, which act the Court holds then excepted the Rosenplanter contract from its provisions. There was a default in 1891, the contract was not forfeited, the law of 1877 was repealed, a saving clause was enacted, but the law of 1892 went into operation. Rosenplanter's contract was in existence in April, 1893, his premium then became due, he was not relieved from the obligation to pay it, *and the statue then in force did not require a notice and none was sent, so that this* default operated to lapse the policy.

Such is the decision in the Rosenplanter case.

Judge HANFORD, in the Hathaway case, says: "I feel "entirely free to concur in the opinions in the latter "(Rosenplanter) case," and then proceeds, after this keeping word of promise to the ear, to break it to the hope by deciding diametrically opposite to the Circuit Court of Appeals in the Sixth Circuit in the Rosenplanter case.

We will now demonstrate such conflict. In the Hathaway case (see Exhibit C) the policy was issued January 26, 1892, when the act of 1877 was in force.

The act of 1877 therefore governed this contract, and, according to the doctrines of Mr. Warburton, would always have governed it, and HANFORD, J., says: "It is "my opinion that the rights of the parties under the pol- "icy of insurance in suit *were not affected or changed by* "*the new legislation of 1892.*"

And yet HANFORD, J., says shortly after: "The sole "question to be decided in the case is whether the amend- "ment of the law of 1892 by the act of 1897 had the effect "to terminate the contract between the parties imme- "diately and to bar an action upon the policy after the "death of the insured, which occurned subsequent to the "date of said statute."

Hanford, J., while apparently holding that the act of

1877 first applied, and then the act of 1892, denies that the act of 1897 ever applied.

Let us apply now the doctrine of the Rosenplanter case to the facts in the Hathaway case.

The Act of 1877 was in force when the Hathaway contract was issued in January, 1892.

No premium became due until January, 1893, when the act of 1892 was in force, and at that time, under the Rosenplanter case, notice had to be sent, because the contract was under the act of 1892. It was not, like the Rosenplanter contract, excepted from the act of 1892; no notice was sent, but Hathaway was not relieved thereby from his obligation to pay in January, 1894. The same held good in January, 1895, January, 1896, and January, 1897. And on April 8, 1897, when there was an existing default, the statute of 1897 was passed, declaring, as HANFORD, J., says: "The act of 1877 permits "life insurance companies doing business in the "State of New York to forfeit their policies "for non-payment of premiums, *and without giving the "printed notice*, but only after the lapse of one year from "the date on which the unpaid premiums became due "and payable, and bars an action upon a forfeited policy "unless it be commenced within one year from the date "of default in the payment of the premium for which the "forfeiture is claimed." In 1894, 1895, 1896, and January, 1897, the act of 1892 applied under the Rosenplanter case.

This statute of 1897 immediately applied to the existing contract (as the statute of 1892 did to the Rosenplanter contract), and all rights under the contract were barred, either April 8, 1898, one year from the passage of the act, or January 26, 1899, one year from the first default subsequent to the act. The action was commenced in April, 1899. Hathaway died April 15, 1898. He himself had

up to April 15, 1898, and his executors or wife and son up to January 26, 1899, at the latest to enforce the contract.

There is one other feature of the Hathaway case. Under the act of 1897, notices are expressly limited to post office addresses within the State of New York (declaratory, as we contend, of the existing law). *So that on January 26, 1898, no notice whatever was under any theory of these statutes required to be sent to Hathaway.*

The act of 1892 was applied on its passage to a pre-existing policy in the Rosenplanter case.

But under Judge Hanford's ruling the act of 1897, can never apply to a pre-existing policy.

The opinions are thus diametrically opposed. There was no express declaration in the act of 1892, making it applicable to pre-existing policies in the sense meant by HANFORD, J. Under the act of 1877 notice was necessary in the Rosenplanter case, the Court says: *And it was not sent.* It was not sent in 1891, or 1892, or 1893, or 1894. But it was held not necessary in 1892, 1893, and 1894. Why? Because the statute of 1892 applied to the pre-existing policy, and declared it after 1892 not controlled by the act.

There was just as much an existing right in Rosenplanter, under the Act of 1877, as there was said to be in Hathway under the Act of 1877, or 1892.

"HANFORD, J., says: "In the Rosenplanter case the "policy under consideration was a term policy, and ex-"pired by its own limitations, unless it was renewed by "the omission of the Insurance Company to proceed ac-"cording to the provisions of the Act of 1877 to effect its "forfeiture."

Not at all. It expired unless the premises was paid, as does every policy; or unless it was renewed by the failure to send notice, and the Court held it was so re-

newed in 1892, and October, 1892, but not in 1893 and 1894. It was, as the Court said, within the meaning and protection of the Act of 1877, but not 1892, as it was expressly excepted.

(2.) The case of Hathaway *v.* New York Life, in the Circuit Court of the State of Oregon for Multonomah County, decided in the case of a policy issued in 1891, and on which no premiums were paid in May, 1892, 1893, 1894, 1895, 1896, and 1897, the insured dying April 15, 1899, that the action was not brought within one year from the date upon which default was made in paying the premium due upon such policy, for the non-payment of which it was claimed that the forfeiture ensued, and that therefore the claim was barred. This was the same life insurance as in the case decided by Hanford, J.

(3.) The case of Schuell *v.* Mutual Life Ins. Co. of N. Y. was recently decided in the Supreme Court of New York, and it was held that after April, 1897, the act of 1897, and not the act of 1892, governed a policy issued in 1896.

See copy decision annexed hereto.

(4.) The case of Hathaway *v.* Mutual Life, (discussed above).

5. The question of the applicability of the Statute of 1897 to the Cohen contract is properly before this Court.

Mr. Warburton, in his supplemental brief, on pages 16, 17 and 18, claims *first* that the statute of 1897 is not before this Court in the Sears and Cohen cases because the assignment of errors do not especially refer to it, and

second, that even if before this Court, it has no bearing on the Cohen and Sears cases. His claims are based upon an entire misconception of the record and of the function of an assignment of error in these cases and of the nature of the statute of 1897. As this matter is discussed in this brief rather than in the Sears brief we will first briefly state record in both cases.

The record in the Sears case shows as follows:

The suit was begun September 28, 1898 (Rec., 1), eighteen months after April 5, 1897, when the act was passed, and six months after Sear's death on March 30, 1898, *two* premium due dates having occurred after April 5, 1897, namely, May 18, 1897, and May 18, 1898.

The answer was demurred to on the ground that it did not state facts sufficient to constitute a defense to the complaint (Record, 20). The demurrer was sustained (Record, 22) and the assignment of errors, and specified that the Court erred in sustaining the demurrer, and further that the Court erred in granting judgment for the plaintiff "because it is manifest upon the issues formed "in said cause that said plaintiff and defendant in error "was not entitled to judgment (Record, 25)."

The case was affirmed by the Ninth Circuit upon the express ground that under the New York premium notice statutes (not expressly referred to in the pleadings) the plaintiff could recover.

The record in this Cohen case shows as follows:

The suit was begun November 9, 1898 (Rec., 1, 10), nineteen months after April 5, 1897, when the act was passed, and almost fourteen months after Cohen's death, on September 21, 1897, *one* premium due, date having occurred after April 5, 1897, namely June 10, 1897.

The answer was demurred to on the ground that it did not state facts sufficient to constitute a defence to the com-

plaint (Rec., 20). The demurrer was sustained, and the assignment of errors specified that the Court erred in sustaining the demurrer, and further that the Court erred in granting judgment for the plaintiff, "because it is mani- "fest upon the issues found in said cause that said "plaintiff and defendant in error was not entitled to "judgment" (Rec., p. 33). The case was affirmed by the Ninth Circuit upon the express ground that under the New York premium notice statutes (not expressly referred to in the pleadings) the plaintiff could recover (Rec., p. 52).

See opinions in these four cases, *which were all on demurrer.*

Mutual Life *v.* Hill, 97 Fed., Rep., 263.
Mutual Life *v.* Allen, 97 Fed., Rep., 985.
Mutual Life *v.* Cohen, 97 Fed., Rep. 985.
Mutual Life *v.* Sears, 97 Fed., Rep., 986.

The Court is also refered to the records in the Sears, Cohen, Hill and Allen cases.

As the Circuit Court of Appeals for the Ninth Circuit said in the Hill case (Hill Rec. p. 63): "There was no "necessity for the defendant in error (*i. e.* the plaintiff "Hill) to plead the Statute of New York. The United "States Courts take judicial notice of all the Public "Statutes of the several states." And in Mills *v.* Green, 159 U S. 657, the Court says: "The lower Courts of the "United States, and this Court on appeal from their de- "cisions, take judicial notice of the constitution and pub- "lic laws of each State of the Union."

The Court takes judicial notice of the statutes of New York, and a fact *judicially noticed* is read into a pleading. (Abb. on Pleading, Sec. 55.)

This Court considers only errors assigned, and the same rule applies to the Circuit Court of Appeals.

An assignment of error is sufficient if it states distinctly

just what action, of the Court below is alleged to have been erroneous.

A statement of *reasons* why the Court should have decided otherwise "constitute a good brief, but in the *assignment of error are irrelevant.*"

Atchison *v.* Meyers, 76 Fed., Rep., 443.

Where final judgment has been entered on demurrer and writ of error is taken no bill of exceptions is necessary.

In Rogers *v.* Burlington, 3 Wallace, 661, defendant demurred, Court sustained demurrer and rendered judgment for defendant. And this Court said: "It is well settled "that the ruling of the Circuit Court in sustaining or "overruling a demurrer to a declaration and rendering "judgment for the wrong party may be re-examined in "this Court by a writ of error without any formal bill of "exceptions."

See also

Suydam *v.* Williamson, 20 Hun, 436.
Aurora City *v.* West, 7 Wall., 91.
Gould *v.* Granville, 91 U. S., 527.

The assignment of errors in this case was in accordance with Rule 11 of the rules of the United States Circuit Court of Appeals, which Rule 11 is similar to Rule 21 of the Supreme Court of the United States. This Rule 11 provides that the plaintiff in error shall file with the clerk, with his petition or writ of error, an assignment of errors which shall state separately and particularly each error desired and intended to be alleged, and that when this is not done counsel will not be heard except at the request of the Court, and if the error has not been assigned according to this rule it will be disregarded, but the Court, at its option, may notice a plain error not assigned.

The assignment of errors and the provisions of Rules 11 and 21, above referred to, and the petition and the writ of certiorari in this case amply justify the presentation of the Act of 1897 to this Court.

In the Sears case the statute of 1892 was not expressly referred to in the pleadings, but the Court took judicial notice of the act of 1892, and held that, as no notice was alleged to have been sent, the act of 1892 prevented a forfeiture. The facts set up in the answer were admitted, and by the answer it appears that no premiums were paid after May, 1892. On referring to the complaint it appears that no suit was begun until September, 1898 (Rec., 3). If, therefore the Court takes judicial notice, and reads into the pleadings the act of 1892, and claims the policy was not forfeited because a notice was not sent, the defendant is equally entitled to have the amending act of 1897 read into the pleadings, andurges the proposition upon the pleadings that no suit was begun within a year from the last default which was May 18, 1897.

In the Cohen case the policy was issued June 10, 1885. Default was made from December, 1892, to June, 1897, subsequent to the passage of the Act of 1897, and Cohen died September 21, 1897. Suit was begun in November, 1898.

In the Allen case the policy was issued February, 1893, and the first default was February 10, 1894, and continued until July 9, 1897, when the insured died, and on December 28, 1897, the suit was begun.

In the Hill case the policy was issued in 1886, and Hill died in December, 1890. But the act of 1897 is not involved in the Hill case.

It is familiar learning that on demurrer judgment is to be taken against the party committing the first default.

Gorman *v.* Lenox's Executor, 15 Peters, 115.
Morton *v.* Kirk, 79 Fed. Rep., 291.

Upon demurrer to answer the judgment of the Court is invoked upon the law of the case as presented by the pleadings.

Baxter *v.* McDonnell, 154 N. Y., 432.
Same case, 155 N. Y., 83.
Henning *v.* Yale, 28 App. Div., 328.

"The case, then, is before the Court upon a general "demurrer, in which must be considered the whole record, "and judgment should be given for the party, who, on "the whole, appears to be entitled to it."

Tyler *v.* Rand, 7 How., 583.
Phillips on Code Pleading, § 85.

It is evident, therefore, that the applicability of the statute of 1897, to the Cohen Sears policies is properly before this Court.

(*b.*) **The Cohen policy became lapsed and forfeited on June 19, 1897, one year after June 10, 1896, the date of the last default, before the passage of the act.**

I.

This construction is not retrospective.

It has been fully shown in this brief that the Act of 1897 controls policies existing at date of its passage and that it is applicable to the Cohen & Sears' policies. The only question here is, what effect the Act had upon its passage where there was a then existing default as in the Cohen & Sears' cases. If the Statutes of

1877 and 1892 apply to the Cohen & Sears' policies at all, and to the extent claimed by opposing counsel, then the Company on April 8th, 1897, could not treat the policies as lapsed because no notice had been sent in May and June, 1896. The Act of 1897 then declared that the effect of such default without notice would only operate to keep the policy alive for a year from the last premium day, and there was no saving clause in the Act of 1897. The policy was subject at all times to the amendment or repeal of the Acts of 1877 and 1892, and the policyholder failed to pay his premiums at his peril of the amendmen tor repeal of such Act. This construction of the Act is not retrospective; each policyholder has the balance of the year, whatever that may be, whether one month or eleven months from the passage of the Act in 1897, within which to pay up his premium, but the prohibition against forfeiture expires when the year lapses.

Cohen defaulted June 1893, 1894, 1895, 1896. No notice having been sent the policy was not forfeited. This was the condition of things on June 10, 1896, and would have continued unless the legislature had intervened. During 1896 Cohen could at any time have paid up his premiums with interest, and restored his policy. *He had no other rights.* By the terms of his contract it was forfeited, but the statute as to notice held this forfeiture as it were in suspense. It did not relieve him from the obligation to pay his premiums. It simply prevented the contracted effect of non-payment from taking place. There was no vested right in this effect. Cohen could say I paid no premium, but you have sent no notice, therefore my contract can not be forfeited for that non-payment. We must admit that but for the Act of 1897, the Cohen policy could not be forfeited for non-payment of the premium of June 1896, until the statute of limitations had run, and it is not now important to determine whether that statute was the legal or equitable statute. But there is no vested

right in the length of the time granted by a statute of limitations, and there is nothing retrospective or violative of any obligation of a contract in a legislative act shortening a statute of limitations after it has begun to run, provided the party effected has an opportunity to act in preservation of his rights before the action of the statute becomes conclusive. Cohen had no vested right. Doubtless the legislature could not remove the prohibition for forfeiture without an opportunity to Cohen to pay up, and this is precisely what they did. The Legislature gave him until June 10, 1897, to pay up, and if not, the forfeiture took place. There is no retrospective or retroactive effect in this. The Legislature acted on an existing default, and declared the future rights of the parties. The Legislature did not in any way destroy the existing privilege to pay up while limiting it.

Again, when June 10, 1897, arrived, Cohen did not pay, and the Legislature had declared that no notice need be sent as his postoffice address was not in the State of New York. There was no retrospective or retroactive effect in this.

Retrospective or retroactive statutes relate to past acts and transactions, and operate on such acts and transactions, and change their legal character or effect.

The past act or transaction was the non-sending of the notice June 10, 1896, and the consequent legal effect of an existing non-forfeiture.

The act of 1897 did not change the legal character or effect of this, or did not operate on this beyond limiting the time of paying up to June 10, 1897. After April 8, 1897, Cohen could have paid up.

It is conceded that not a single premium had been paid subsequent to June 11th, 1892, and that every premium to the death of Cohen September 21, 1897, remain unpaid and in default. Now when the act of April, 1897, was passed, the policy holder was advised

h is premiums were unpaid ; that nothing stood between him and the consequences of his defaults save the former legislation of the State of New York, which had been taken away. He was at liberty to promptly make payment and to see to it he did not run the hazard of death with these premiums unpaid and in default, because he was advised that unless the premiums were paid within one year after they fell due, that neglect of itself operated as a termination of the policy. He was further advised that if he left defaulted premiums unpaid and should die, that no recovery could be had unless the action were instituted within one year from the date of default in the payment of an installment of premium claimed to be due. Nobody in the case disputes that such premiums were due and in default. The plaintiff in the case adopts that view and claims the right to make such payments out of the amount of the policy. The Court adopts the same view of all these premiums being unpaid and in default and makes deduction for each of them and deduction for interest from the time that they respectively should have been paid. The insurance company makes claim that each of these installments has been due and in default from the time it should have been paid, and that such default has operated as a termination of the policy. Now in this conceded state of facts, *when*, after the death of the insured, must the action be maintained in order to have the benefit of the statute ? It is through the statute alone that the right comes. It is not in form a statute of limitation, but a statute preserving and giving a right. That statute declares : "No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the date upon which default was made in paying the premium, installment, interest or portion thereof for which

it is claimed that forfeiture ensued." Now the words "forfeited policy," as we have shown, have the definition the legislature itself has given them in the act, that is, a policy that has not been renewed by the payment of the premium within the specified time. The meaning of this act is as if it read "no action shall be maintained to recover upon a policy, the payment of whose premium is in default, unless that action is commenced within one year from the date upon which that default occurred." Clearly the premium falling due June 11, 1896, was not paid—clearly such non-payment caused a lapsing of the policy for not having been made within one year from June 11, 1896.

II.

Even if our construction be considered retrospective, this constitutes no objection to such construction.

There is no constitutional provision in New York as in some States against retrospective legislation.

The Act of 1897 is a remedial act. There is no limitation of the act to subsequent defaults. The main error lies in treating an existing default where there has been no notice, as though the policyholder thereby acquired a vested right. But a vested right in what? Is it a vested right in not having the company forfeit his policy? If so, that right depends on his default without notice. But he can at any time pay up arrears. When the next premium due date arrives he is not relieved from the obligation to pay the premium, because of the prior default and absence of notice. Opposing counsel misuse in this connection the language of the Courts as to the statute

being part of the contract, and that, as there was no notice the premium never became due. But no such language has ever been used in connection with a discussion of the effect of an amendment of the statute, or the effect of successive defaults. The premium becomes due, there is obligation to pay, the statute only affects that part of the contract which declares the result of not paying. The statute was applied by the Courts to existing policies, for the very reason that it did not impair the obligation on the part of the policyholder to pay his premiums to the Company. It simply imposed a condition precedent to forfeiture. The Act of 1897 did not interfere retrospectively with this condition precedent on June 10, 1896. The default was in the past, it is true, but the prohibition had its full continuous effect up to June 10, 1897.

The notice is not by this construction dispensed with in the case of a pre-existing default, but a statutory effect of want of notice continues, until the next premium due date, when it is dispensed with.

It may be a settled rule that Courts uniformly refuse to give to statutes a retrospective operation, *where rights previously vested are injuriously affected*, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature.

Cook *vs.* United States, 138 U. S., 181.

But in this case there is no right previously vested and injuriously affected. Cohen had no notice June 10, 1896, and he did not pay, and the policy was not forfeited, and the effect of that lack of notice expired on June 9, 1897.

III.

The statute bar of one year in the Act of 1897 is not a State statute of limitations, but a bar connected with the rights given by the statutes of 1876, 1877, 1892 and 1897.

Prior to the statute of 1876 no statutory notice was necessary in the State of New York. Notice of default, and consequent forfeiture, were left completely under the control of the parties to the contract.

But after 1876, in the case of New York business, unless the statute was waived, the result of a default was not the termination of the contract unless the statutory notice had been sent.

The object of the act was to meet an assumed forgetfulness of policy holders. It soon, however, began to be used for speculative purposes by representatives of deceased policy holders who had abandoned their contracts.

Such a misuse of the statute was monstrous, and, instead of being a protection to policy holders, it became an instrument of fraud upon the companies and other policy holders.

The nature of the insurance contract requires an *annual* payment to enable the company to meet the obligations of the contract.

It might be reasonable to provide that *one* default should not operate to lapse the contract unless the policy holder had a written notice of his obligation to pay, but it was unreasonable to have absence of notice operate to continue insurance indefinitely without further payment of the annual sum required to produce the proceeds of the insurance contract.

This led to the affixing by the Act of 1897 of the conditions found in that act to the effect of the absence of notice.

This statute belongs to that class of statutes which are referred to by Mr. Justice PECKHAM in Bear Lake Irriga-

tion Co. *vs.* Garland, 164 U. S., 1, at page 14, where he says: "It may be assumed that where a statute creates a "right not known to the common law, and provides a "remedy for the enforcement of such a right, and limits "the time within which the remedy must be pursued, the "remedy in such case forms a part of the right, and must "be pursued within the time prescribed, or else the right "and remedy are both lost."

So in Hill *vs.* Supervisors, 119 N. Y., 347: "It must "be evident that, as this action is brought under a special "law and is maintainable solely by its authority, the limi- "tation of time is so incorporated into the remedy given "as to make it an integral part of it and the condition "precedent to the maintenance of the action at all."

The case of Hamilton *vs.* Royal Ins. Co., 156 New York, 338, commenting on this, says: "It is doubtless true that "where time is the essence of the right created, and a lim- "itation as to the time of the enforcement is a part of the "statute under which the right arises, so that there is no "right of action independent of the limitation, the limi- "tation extinguishes the right rather than affects the "remedy, and such contracts are not subject to the exemp- "tion contained in the Statute of Limitations."

IV.

Such statute bar as this is enforceable in any jurisdiction where the statute right is asserted.

Mrs. Cohen, in the United States Court in the State of Washington, asserted her rights in the policy as an existing contract on Sep. 21, 1897, when Cohen died, and based these rights on the New York statutes. If the U. S. Court sitting in Washington adopts the New York

statute as a rule of right to be administered within its jurisdiction, it must also administer the right subject to the limitations which have been made a part of its existence by the act of 1897.

This principle was declared in the Harrisburg, 119 U. S., 199, where it was held as follows: (head note)

In the absence of an act of Congress or a statute of a State giving a right of action therefore, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the sea, which is caused by negligence.

If a suit *in rem* can be maintained in admiralty against an offending vessel for the recovery of damages for the death of a human being on the high seas, or on waters navigable from the sea, which is caused by negligence, when an action at law is given therefor by statute in the State where the wrong was done or where the vessel belonged (which is not decided), it must be commenced within the period prescribed by the State statute for the beginning of process there; the time within which the suit should be commenced operating as a limitation of the liability created by statute, and not of the remedy only.

This Court, in its opinion, on page 214, says:

"This brings us to the second branch of the question, "which is, whether, with the statutes of Massachusetts "and Pennsylvania above referred to in force at the time "of the collision, a suit *in rem* could be maintained against "the offending vessel if brought in time. About this we "express no opinion, as we are entirely satisfied that this "suit was begun too late. The statutes create a new "liability, with the right to a suit for its enforcement, "provided the suit is brought within twelve months, "and not otherwise. The time within which the "suit must be brought operates as a limitation of the

" liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liabilty and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right. No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown. As to this, it only appears that the wrong was done in May, 1877, and that the suit was not brought until February, 1882, while the law required it to be brought within a year.

A similar question arose in the case of Cavanagh *v.* Ocean Steam Navigation Co., 13 N. Y. Supplement., 540, where an action was brought against a British corporation for a death on the high seas. The action was based on " Lord Campbell's Act." The Court held that the one year limitation in that act applied, and not the Code of Civil Procedure of New York. The Court said :

"The right of action, is given by the act of parliament. In "the complaint the suit is grounded on that act alone, and, " as Judge EARL says in Robinson *v.* Navigation Co., [112 "N. Y. 315] 19 N. E. Rep., 625, the cause of action exists only " by virtue of that statute. Without it no suit could be " maintained here. McDonald *v.* Mallory, 77 N. Y., 546; " Leonard *v.* Navigation Co., 84 N. Y., 48; Debevoise *v.* " Railroad Co., 98 N. Y., 379; Vandeventer *v.* Railroad

"Co., 27 Barb., 244; Whitford *v.* Railroad Co., 23 N. Y., "465. In the last cited case it is said that 'if the state "in which the injury is committed has declared the con- "sequences, and defined the liability therefor, "and de- "fined the liability therefor," that law must govern,' and "that the rule of decision is the law declaring that "liability; and in the same case it is further remarked "(Denio, J.) that we administer the foreign law from the "proofs as we find it to be. The limitation of time in "this foreign statute is not an immaterial incident affect- "ing the remedy only; it is more than a mere matter of "unimportant detail, separated from the liability itself "created by the statute. It is part of it. Any restraint "or circumspection the sovereign power enacting a law "chooses to put upon its operation is an integral part of it "and inseparable from the right or liability created by it. "If it be a limitation of time within which a liability must "be enforced, that limitation is of the essence of the lia- "bility. It was recently so held in Hill *v.* Supervisors, "119 N. Y., 344, 23 N. E. Rep., 921, and such is the view "taken by the Supreme Court of the United States of "Statutes of Massachusetts and Pennsylvania in *pari ma- "teria* with the English Statute. In a proceeding in the "United States Courts the Statute referred to came under "consideration (The Harrisburg, 119 U. S., 199, 7 Sup. "Ct. Rep., 140), and the Court (WAITE, C. J.) says: "'The Statutes create a new legal liability with a right to "a suit for its enforcement, provided the suit is brought "within twelve months, and not otherwise. The time "within which the suit must be brought operates as a "limitation of the liability itself as created, and not of "the remedy alone. It is a condition attached to the right "to sue at all.' 'Time has been made the essence of the "right, and that right is lost if the time is disregarded.' "As thus defined, the right of action is conditional. "The limitation inheres in the right itself. It does not "relate to the remedy alone, and the provisions of the "Code of Civil Procedure invoked by the plaintiff as the "law of the forum do not apply."

The *Cavanagh* case (*supra*), was cited and relied upon in *Kiefer* v. *Grand Trunk Ry. Co.*, 12 App. Div., 28 at 33

(construing and applying Ontario Lord Campbell's Act) S. C. affirmed on this opinion in 153 N. Y., 688, the effect of which was of course to adopt the reasoning of the Court below.

See also

Daily v. *N. Y. Ontario & Western Ry. Co.* (February, 1899), 57 N. Y. Supp., 485, S. C. 26 Misc. Rep., 539 (construing and applying Penna. Lord Campbell's Act sued on in New York, limit 1 year) citing late cases.

So *Boyd* v. *Clark*, 8 Fed. Rep., 849, per BROWN, D. J. (now Mr. Justice Brown of the Supreme Court of the United States) construing and applying Ontario Lord Campbell's Act and sustaining demurrer to declaration because action not brought within the time limited by *that* act.

See also

City of Eureka v. *Merrifield* (Kansas Court of Appeals) 58 Pacific Rep., 243.

Barker v. *H. & St. J. R. R.*, 91 Mo., 86 at 94.

Taylor v. *The Cranberry Iron Co.*, 94 N. Car., 525.

Lambert v. *Ensign Mfg. Co.*, 42 West Va., 813.

The Corsair, 145 U. S., 355 at 344.

So in Palen *vs.* Johnson, 50 New York, 49, where a statute gave the borrower the right to recover back usurious interest within one year, the Court says at p. 52: "The "limitation is co-extensive with the right declared, and "plainly implies a prohibition of any action by that party "after one year."

So *Eastwood* v. *Kennedy*, 44 Maryland, 563.

(The right to recover for illegal interest being given by Act of Congress must be subject to the terms prescribed by that Act as to the time within which the right must be asserted).

So *Hudson* v. *Bishop*, 35 Fed. Rep., 820, per Brewer, J., now Mr. Justice Brewer of the Supreme Court of the United States. (Action on statutory bond with special limitation—limitation must be observed).

So in *Commissioners of the Sinking Fund of Louisville* v. *Buckner*, 48 Fed. Rep., 533 at 535-536, sustaining defendant's demurrer to petition.

("The statutory remedy [a two year limit] must be pursued as granted by 'Congress, else there is no right of action.")

Ibid p. 536 top of page.

So where a statute forbids actions of a specified class or nature to be brought until after the performance of a condition precedent such as audit, demand on presentation, the complaint is bad on demurrer if it does not show performance of the condition.

Reining v. *City of Buffalo*, 102 N. Y., 308, 311.

So *Selover* v. *Coe*, 63 N. Y., 438.

Cohen insured in Washington with a foreign company and he was bound by the provisions in the statute governing it, if those statutes ever applied to his policy. "It "must be borne in mind that one who deals with a foreign "corporation must take it as a creature of the law of its "own country, *subject to the legislative control* and direc- "tion that may be properly exercised over it at the place "of its creation" (Murfree, pp. 23, 24).

POINT V.

If the Cohen policy did not become lapsed and forfeited on June 9, 1897, one year after the premium due June 10, 1896, because a year had not elapsed from April 8, 1897, yet it became lapsed and forfeited on June 10, 1897, by its terms, for on that day default was made, and by the express provision of the act no notice was necessary because Cohen's post office address was not in the State of New York.

The company contends that should the proper construction of the act be that the full year referred to in the act must elapse after the act, or after a default subsequent to the act, then while this might apply where post office addresses were within the State of New York, it would not apply where there were no such post office addresses, but the obligation to send notices in such cases at the latest terminated on April 8, 1897. And this was true in the Cohen case.

The language of the act of 1897 is "at his or her last "known post office *address in this State.*"

The only case known of where the Act of 1897 has been construed on this point is the recent case of Rosson *vs.* Equitable Life, decided in the Superior Court of Los Angeles, California, in which case TRASK, J., said: "Since that decision (the Griffiths case) was rendered the "New York statute has been amended. It did not then "provide, as it does now, that the notice shall be mailed "to the 'insured at his or her last known post office ad- "dress in this State.' The important words 'in this "State' were inserted in 1897. This part of the law, at "least, therefore, cannot govern California contracts."

See Opinion annexed hereto, Exhibit E.

Whether the Act of 1897 be regarded as a new law or as simply declaratory of what the pre-existing law was, it is clear that subsequent to the passage of that act, that is subsequent to April 8, 1897, no notice had to be sent to Cohen, as he was not a resident of the State of New York.

This act took effect April 8th, 1897, and Cohen was alive on June 10, 1897, when a premium became due and was not paid.

Under the doctrine of the Rosenplanter Case, 93 Fed. Reporter, 721, whether the law of 1897 was a new law or merely declaratory of the existing law, no notice was required to be sent to Cohen, and as he did not pay his premium on that day, the policy was lapsed and forfeited for failure to pay that premium, entirely irrespective of what had occurred previously.

On the theory of the defendant in error, if Cohen was sent no notice on June 10, 1893, and did not pay his premium at that time, his policy was not void and forfeited; but the failure to send a notice could not possibly carry the policy any further than the payment of a premium would have carried it; so by successive failures to send notices, even if there were successive failures to pay premiums in 1893, 1894, 1895 and 1896, his policy was carried in force up to June 10, 1897, but at that time, the defendant was obliged to send no notice, and if he failed to pay his premium then the policy was forfeited and lapsed.

In both the Cohen case and the Sears case a premium became due after April 8, 1897, during the lifetime of the insured; in the Cohen case on June 10, 1897, and in the Sears on May 18, 1897.

In the Cohen case the first default was June 10, 1893, so that no question can possibly arise in this case as to the effect of the saving clause in the Act of 1892, referred to by Hanford, J., in the recent Hathaway case.

Under the most extreme view that can

be taken the defendant in error Cohen cannot recover, because the action was not brought within a year from June 10, 1897.

We contend that the Legislature had a right by the Act of 1897, to operate upon the existing default occasioned by the non-payment of the premium due on June 10, 1896, and, in fact, to prescribe a short statute of limitations, within which Cohen could bring an action either on the policy or to reinstate it and prevent a forfeiture, such short statute to be effective within a year from the default occurring previous to the Act of 1897. It is impossible to believe that the Statute of 1897 could ever be construed in the face of its plain language to refer merely to defaults occurring after it went into operation, but taking the most extreme view that can be held of the defendant in error's rights, even if the statute of 1897 be assumed to refer only to defaults occurring after it went into operation, no sound reason can prevent the effect of the language of the statute by which the company is not clearly prevented from declaring forfeited any policy after a year from the time that there may be a default in the payment of a premium thereon falling due subsequent to the passage of the statute. There can be no vested right that the legislature could not, with respect to premiums falling due subsequent to its action, change the prohibition against the company's declaring the policy forfeited for non-payment of premiums from the ordinary time given by the statute of limitations to one year.

The right given by statute could be taken away by statute. The right given to the policyholder to pay his premium, to be exercised within the time of the running of the statute of limitations, could be limited by subsequent statute with regard to premiums falling due after

the passage of the statute to a time shorter than that given by the effect of the statute when originally passed, which, of course, in the absence of the declaration of a period of time in the statute would be that of the statute of limitations of the forum where judicial action might be invoked.

No possible complaint can be made if the one year provided by the statute is allowed to elapse before forfeiture when there has been no notice.

"The act, in terms, purports to preserve all existing "rights of taxpayers for the period of six months after "the passage of the act and to establish a rule of evidence "to govern future controversies, which made such deeds "presumptive evidence of the regularity of the proceedings "upon which they were based, and after two years from "the recording, conclusive evidence of the same matters. "With reference to the six-months' provision, it operates, "as to all existing cases, as a limitation upon the tax-"payer's right to assert his claims under pre-existing "laws, and, as to all future cases, provides that the lapse "of two years from recording shall make that which was "before presumptive evidence only, conclusive upon the "rights of the parties. The act seems to be, in its princi-"pal aspect, one of limitation, and, as such, is within the "constitutional power of the Legislature to enact as affect-"ing future cases, and, we think, *within settled rules*, "*equally within its power as to existing rights.* It gives, "in all cases, a time for the person aggrieved to establish "his rights unaffected by the provisions of the enactment; "but provides that after the lapse of a certain time the "Comptroller's deed shall be conclusive evidence of the "regularity of the proceedings upon which it is based. "Legislation of such a character has frequently been "held within the constitutional power of the Legislature "to enact."

People *vs.* Turner, 117 New York, 233.

POINT VI.

If the Court holds that the true construction of the statutes of 1877 and 1892 required a notice to be sent Cohen unless waived then it is claimed by the plaintiff error that the sending of any statutory notice was waived by Cohen by the express terms of the policy.

For argument on this point, see Phinney brief, Point V.

See Dannhauser *vs.* Wallenstein, 28 N. Y., Miss. R., 690, discussed on p. 124 of our original brief.

In Griffith *vs.* Earl of Dudley, 9 Q. B. D., 357, also it was held that it was competent for a workman to contract with his employer not to claim compensation for personal injuries under the Employees Liability Act. The Court said as to the claim that the contract was against public policy: "It is at least doubtful, whether, where "a contract is said to be void as against public policy, "some public policy *which affects all society is not* "*meant.* Here the interests of the employed only "would be affected. It is said that the intention of "the legislature to protect workmen against imprudent "bargains will be frustrated if contracts like these are "allowed to stand. I should say that workmen as a "rule were perfectly competent to make reasonable "bargains for themselves."

A strict adherence to the erroneous doctrine of the Griffith case as to waiver would result in depriving the company and the insured of all power to agree upon any detail such as another form of sending the notice.

But the Court of Appeals in New York sanctions a

more liberal interpretation, for in the Carter case (110 N. Y., 15), the Court says: "It would, of course, be "competent for him to agree upon some other mode of "address." That is, the parties could contract respecting the statutory notice.

POINT VII.

The contract was abandoned by Cohen, and this he had a right to do.

For argument on this point see Phinney brief, Point VI.

If notice was required, Cohen, and not the plaintiff was the one to receive it. He was under no obligation to keep up the policy, and could abandon paying of premiums at any time, and the beneficiary would thus lose all interest in the policy.

POINT VIII.

The alleged cause of action was not pleaded and there was a departure. For argument on this point see Phinney brief Point VII.

POINT IX.

The judgment should be reversed.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. MCKENNEY,
Of Counsel.

APPENDIX.

Exhibit A.

ROSENPLANTER *v.* PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK.

(Circuit Court, W. D. Tennessee, W. D. January 7, 1899.)

1. LIFE INSURANCE—CONSTRUCTION OF POLICY—TERM INSURANCE.

A life insurance policy in terms insuring the holder for one year from its date, but containing a provision for its renewal from year to year during the life of the assured by the payment of successive annual renewal premiums, is not an entire contract for the life of the assured, but is a valid "term insurance contract for one year," within Laws N. Y. 1892, c. 690, § 92, which is specially excepted by that section from its general provision that no policy shall be declared forfeited or lapsed for nonpayment of premiums without the prescribed notice to the insured.

2. SAME—STATUTES REGULATING FORFEITURES—EFFECT OF REPEAL.

Laws N. Y. 1877, c. 321, providing that no policy of life insurance should be declared forfeited unless a prescribed notice should be served on the insured, did not become a part of the contracts created by policies

subsequently written in the State, so that its repeal impaired the obligation of such contracts, but was merely a regulation for the government of insurance companies, belonging to the class of remedial statutes which it is competent for the legislature to enact, repeal, or amend, making the same applicable to existing contracts, without affecting the obligation of such contracts.

On Demurrer to Declaration.

The defendant issued a policy of insurance upon the life of Carlos G. Rosenplaenter, in favor of his wife, Mary Anna, the above-named plaintiff. It is dated on the 1st day of April, 1889, is for the sum of $10,000, and payable, at the death of the life assured, to the beneficiary. The consideration named, besides the conditions and agreements indorsed upon the back of the policy, is: "The payment of the first annual premium on this policy, and in semi-annual equivalents of $168.60, each payable on the 1st days of April and October, respectively,"—in consideration of which payment the defendant company promises to pay the plaintiff the sum of $10,000 "within ninety days after the acceptance of satisfactory proof, at its office in the city of New York, of the death of Carlos G. Rosenplaenter, * * * provided such death shall occur before twelve o'clock noon on the 1st day of April, A. D. 1890." The following is one of the stipulations of the policy: "And the said society further agrees to renew and extend this insurance upon like conditions during each succeeding year of the life of the insured from date hereof upon the payment of the annual renewal premium for the actual age attained, in accordance with the schedule rate printed on the next page of this policy for each one thousand dollars insured, except as reduced by the application of the surplus and guaranty fund, such payment

to be made in semi-annual equivalents, payable on the first days of April and October, respectively, in each succeeding year." Among the conditions and agreements referred to in the policy is this: "Sec. 3. The annual premiums of this policy may, by consent of the society, be paid by the half-yearly or quarterly equivalent, as indicated below, if desired; but failure to pay when due any such semi-annual or quarterly equivalent will then terminate the policy. In case of claims by death, any unpaid portion of the annual premium will be deducted from the sum insured."

The declaration, after counting on the policy, avers that the premiums were paid, in accordance with the terms of the policy, on the 1st days of April, 1889, October, 1889, April, 1890, October, 1890, and the 1st day of April, 1891. It is then averred that the life assured died on the 5th day of September, 1894; that the plaintiff applied for proper forms and blanks to make the required proofs of loss, but these were refused, and she was informed that the policy would not be paid, because it had lapsed for nonpayment of premiums. The declaration pleads, as an avoidance of the alleged forfeiture, a statute of the State of New York, setting out such parts as are deemed material in hæc verba; but, for convenience, the whole of said statute is here quoted, as follows (Chapter 321, Laws 1877):

"SECTION 1. Section one of chapter three hundred and forty-one of the Laws of Eighteen Hundred and Seventy-Six, entitled 'An act regulating the forfeiture of life insurance policies,' is hereby amended so as to read as follows: 'Sec. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of nonpayment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed

notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known postoffice address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest. anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice: provided however, that a notice stating when the premium will fall due, and that if not paid, the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.'

"SEC. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given."

After averring that the policy was a New York contract, and that in the application for the policy it was stipulated that it should at all times and places be construed to be a contract made in the city of New York, the

declaration avers that the defendant company failed to give or mail the notice required by the said statute, but did mail a notice on the 1st day of September, 1891, to the insured, that the said premium was payable October 1, 1891, which the plaintiff avers was only twenty-nine days, and not the thirty days required by the statute, wherefore the policy remains in full force and effect. It is then declared that the life assured kept and performed all the conditions required of him except the nonpayment of the premiums payable October 1, 1891, April 1, 1892, October 1, 1892, April 1, 1893, October 1, 1893, and April 1, 1894. The declaration is not very clear in its allegations, but may be taken to aver—what is understood to be the fact—that after the notice mailed on the 1st day of September, 1891, no notice was given by mail of the subsequently accruing premiums, which were not paid. This may be held to be included in the general averment that the defendant failed to comply with the statute in regard to notice, and that the said policy is still in full force and effect.

There is a demurrer to this declaration upon the following grounds:

First.—The declaration shows that notice was mailed on the 1st day of September, 1891; that the next premium payable was October 1, 1891, which the life assured or the plaintiff failed to pay. Therefore it appears that the policy was forfeited for the nonpayment of the premium due October 1, 1891.

Second.—The declaration shows that the first year of insurance expired at noon on the 1st day of April, 1890; that the company agreed by the contract to renew and extend the insurance each succeeding year, upon the payment of the annual renewal premium for the actual age attained according to the given schedule, the payments to

be made in semi-annual equivalents, payable on the 1st days of October and April, respectively, in each succeeding year; that the life assured paid only down to and including the payment due the 1st day of April, 1891, failing to pay the premiums due on the 1st days of October, 1891, April and October, 1892, April and October, 1893, and April, 1894; that if the notice mailed on the 1st day of September, 1891, was invalid for any reason, then the only effect of its invalidity was to extend and renew the policy of insurance to the 1st day of April, 1892, and not thereafter; that if no notice was then given, the only effect of the failure was to renew the policy to the 1st day of October, 1892; that after that date the above statute of 1877 was altered, amended, and repealed by section 92 of chapter 690 of the Laws of New York for 1892, which is as follows: "Sec. 92. No Forfeiture of Policy without Notice. No life insurance corporation doing business in this state, shall declare forfeited or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment when due of any premium, interest or installment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known postoffice address, postage paid by the corporation or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium by or before the day when it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall, in any case, be forfeited, or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." This section was amended by Chapter 218, Laws 1897, by adding the following: "No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued."

After thus pleading the New York statute of 1892, the second ground of the demurrer proceeds to aver that the effect of the act of 1892 was to so amend the law of 1877, in respect to such forfeitures and lapsing of policies as to except from the operation of the law of 1877 all policies based upon the payment of monthly or weekly premiums, "or where the policy issued was for a term of one year or less"; that it appears from the averments of the declaration that the contract of insurance set out was for a term

of one year or less, wherefore the policy was not within the operation of the law of 1877; and that upon the failure of the life assured or the plaintiff to pay the premiums due April 1 and October 1, 1892, and the subsequently accruing premiums, by the express terms of the policy it became lapsed and forfeited.

Third.—The third ground of demurrer is that the declaration shows that the policy insured the life assured from the 1st day of April, 1889, until the 1st day of April, 1890; that it was the agreement of the defendant company to renew and extend the life insurance under like conditions during each succeeding year of the life assured, upon the payment of the annual renewal premiums for the actual age attained, according to the rates in the schedule, the payments to be made semi-annually on the 1st days of April and October in each succeeding year; that since the declaration shows that the premiums were only paid down to and including the 1st of April, 1891, and that there was a failure to pay the premium of October 1, 1891, under the terms of the policy the renewal effectuated April 1, 1891, expired April 1, 1892; that the failure of the defendant company to give the required statutory notice of the premium due October 1, 1891, could do no more than would have been done by the premium if paid, namely, to continue the policy in force until April 1, 1892, by the very terms thereof; that the stipulation on the part of the defendant company to renew the policy for another year from April 1, 1892, to April 1, 1893, depended upon the performance by the assured of a precedent condition, namely, the payment of the renewal premium of April 1, 1892, which condition not having been performed, the policy was, by its own terms, lapsed and forfeited.

The above statement of the third ground of demurrer is somewhat more specific than the demurrer itself, and

comprehends a suggestion made at the argument, namely, that the failure of the insurance company to give notice of the forthcoming premium could have no more effect than the payment of the premium itself would have had; but it is a fair inference to be deduced from the groundwork of the demurrer, and is here stated in that form to exhibit more fully the cause of the demurrer.

WILKERSON & PIERSON, for plaintiff.

FRANK P. POSTON, for defendant.

HAMMOND, J. (after stating the facts as above). This demurrer must be sustained. The plaintiff claims too much for the effect of the failure to give notice of the forthcoming premium due October 1, 1891. It may be conceded, as it must be, that the 29 days of the actual notice is not the 30 days of the statute, and yet it does not follow that this policy of insurance was forever kept in force thereafter by that mere circumstance. The forfeitures incurred in the failure to pay the subsequently accruing premiums of April and October, 1892, of April and October, 1893, and of April, 1894, must each depend upon its own circumstances, and neither of these failures can receive any aid from the failure to give notice of the premium due on the 1st of October, 1891.

The real question in this case is whether or not the failure to pay the premium due on the 1st of April, 1892, has been excused by any averments of this declaration. But, before considering that question, it is well enough to note that, by the terms of this policy, these were not semi-annual premiums. The premiums of the policy are annual premiums; but it is agreed that each premium may be paid "in semi-annual equivalents," payable on the 1st days of April and October. Nevertheless, the whole policy shows that the groundwork of it is annual premiums, the importance of which distinction is apparent

when the policy is read in reference to the statutory regulations involved in the controversy.

It was indeed decided in Fearn *v.* Ward, 80 Ala. 555, 562, 2 South. 118, that:

"The contract of life insurance has its inception in the issue of the policy, and is a complete and entire contract for the life of the assured, continuing during life, and payable at death when no earlier definite period is fixed, but subject to be discontinued by nonpayment of the premiums as agreed, such payments being conditions subsequent. The annual premium is not paid in consideration of insurance for a single year, and its payment is not a condition precedent to renewal. Each premium constitutes a part of the consideration of the contract as one and entire, and the amount is fixed and regulated by the prospective duration of the life of the assured, which enters as an element into the contract."

This also had been decided before, in the case of Insurance Co. *v.* Statham, 93 U. S. 24. It is admitted in this opinion that the contrary view has been taken by respectable authorities, but that is undoubtedly the general rule. However, this is to be understood only of the character of contracts involved in those cases where the insurance was of the form in controversy in those cases. To use the language of the Statham Case, "these policies did assure the life of the party named in a specific amount for the term of his natural life." And it is to that kind of a policy that those adjudications must be confined. They do not establish, and it cannot be affirmed, that all policies of insurance are in that form, or of that kind. And there is no reason why an insurance company and the party assured may not make an agreement for a policy of insurance from year to year if they choose to do so, and that is precisely what the parties to this contract did. If they had set to work to make a contract with the intention of putting it in a form that would obviate the ruling in those

two cases, they could not more effectually have accomplished that purpose than they have by the language of the policy now involved. Its distinct promise to pay is at the death of the life assured, provided such death shall occur before 12 o'clock noon on the first day of April, 1890,—precisely one year from the date of the policy. This was an insurance for a single year, and no more. The next succeeding clause of the policy prescribing the terms upon which it might be extended distinctly says that such renewals shall be for each succeeding year of the life assured, from the date thereof. And the mere reading of the whole stipulation shows that the policy is an insurance for one year, with the right of renewal at the expiration of each year of insurance; and it is no more than this. There is no principle of law which disables the parties from making a contract like that, and therefore the decisions which have been cited do not apply to this case.

Under the New York Statute of 1877 (Chapter 321), quoted in the foregoing statement, there would be no doubt, in my judgment, of the right of the plaintiff to recover on this policy. The proviso of the first section was not complied with, because there were only 29 days of notice given, stating when the next premium would fall due, by the letter which was mailed on the 1st day of September, 1891. This was distinctly decided in the case of Hicks *v.* Insurance Co., 9 C. C. A. 215, 60 Fed. 690, which decision is supported by the adjudications in the State of New York upon that subject. The premium falling due on the 1st of October, 1891, not being paid, did not cause a lapse of the policy, or entitle the defendant to declare a forfeiture, for it was only by giving a new notice under the main requirement of the act that the defendant company could have secured a lapsing or forfeit of the policy for the failure. It is not shown by anything in the record, and it was not pretended in the argument, that

any such notice was given. Neither did the company give the notice required by the statute when the premium fell due on the 1st of April, 1892; nor the semi-annual premium that fell due on the 1st of October, 1892; nor the semi-annual premium that fell due on April 1, 1893; nor the semi-annual premium that fell due October 1, 1893; nor that of April 1, 1894. As to none of these failures did the company take the pains to give the life assured or the beneficiary notice that a forfeiture would be claimed for such nonpayment, and, not having done this, they could claim no forfeiture for any of those failures, under the act of 1877.

But it is my opinion that the case is governed, not by the act of 1877, but by chapter 690 of the Acts of 1892, quoted in the foregoing statement. The date of the passage of that act does not appear, but, if it be assumed that it was passed on the very last day of the year 1892, it would govern the premium falling due April 1, 1893, October 1, 1893, and April 1, 1894, none of which were paid, and as to none of which, under the act of 1892, was the life assured or the plaintiff entitled to notice as prescribed by the act, because, as I have endeavored to show, this was "a term insurance contract for one year," which was especially excepted from the provisions of that act requiring notice to be given to secure a forfeiture on the part of the insurance company. I do not see that there is any room for doubt of this proposition.

But the plaintiff undertakes to escape a forfeiture under that act by contending that this policy is governed by the act of 1877, and not the act of 1892. The reasoning upon which this contention goes is that the provisions of the act of 1877 were incorporated by the statute into the policy with the same effect as if the provisions of that act requiring notice had been, in terms, written in the stipulations of the policy itself, and that the subsequent

act of 1892 is of no effect, because it would be unconstitutional as applied to such a contract, by impairing its obligation. I cannot assent to this. If the provisions of the statute as to notice had been written in the policy as agreements of the parties, that would have been their contract, and, of course, the law could not make another contract for them; wherefore it would be enforced by the courts as the agreement of the parties. But the statute did not undertake to make a contract of insurance for the parties. It was only a statutory regulation for the government of insurance companies, compelling them to give notice, as required by the act, of the nonpayment of premiums, before they would be allowed to declare a policy forfeited according to its stipulations. It was a regulation that the legislature had a right to make. It was a beneficent regulation for the relief against a forfeiture created under the contract, which it was entirely competent for the legislature to withdraw, alter, or amend, as to it might seem best. Surely, if we turn the principle contended for the other way, its operation would be denied by the plaintiff and her counsel; that is to say, if an insurance company should contend that at the time of the passage of the act it had already issued a policy defining the terms of forfeiture, and that it was not within the power of the legislature to impair the obligation of that contract, by importing into it a different stipulation or provision as to the conditions of forfeiture, the beneficiaries would deny that such legislation unconstitutionally impaired the obligation; but, if the legislature has the power to import into an existing contract such a regulation for giving notice without impairing the obligation of the contract as to the insurance company, it has the right to take it away by repeal, without impairing the obligation as to the beneficiary.

Judge WALLACE says, in the case of Hicks *v.* Insurance

Co. *supra*, that the policies, being New York contracts, were, of course, dominated by the statute respecting forfeitures as completely as though the statutory conditions had been explicitly incorporated in them. This is true only *sub modo;* but it was not the intention of the learned judge to declare that a repeal of a statute respecting forfeitures would impair the obligation of the contract. He had no such question as that before him, and the inference that is drawn from this segregated sentence of his is quite gratuitous. It must rest upon its own merits, and can have no aid from this sentence of that decision. Such statutes as these assume by their very existence that the parties have, by the terms of their contract, incurred a forfeiture, and they had no design of prescribing conditions under which a forfeiture should take place, but only those under which, by legislative bounty, the forfeiture should be condoned or relieved against after it had been incurred. They are not statutes of contract, but remedial statutes; and as to these the rule is that they are not a part of the obligation of the contract. It is not because of the effect of either of these statutes that we have under consideration that the plaintiff or the beneficiary has not incurred a forfeiture strictly according to the terms of the contract, but only that the legislature of New York, having authority over contracts made within the State of New York, has relieved her against a forfeiture so far as the statutes apply, but no further. One who grants a bounty may withdraw it; and it is a mistake to suppose that the right to it becomes perpetual because it has once been granted, where the nature of the gift is such that it must recur from time to time.

I do not see that the case of McCracken *v.* Hayward, 2 How. 608, cited by counsel for plaintiff, has any bearing on the question. In that case it was determined that a state law which prohibited property from being sold on

execution at less than two-thirds of its appraised value impaired the objection of contracts; and this, because the plaintiff had a right, at the time the contract was made, to a judgment and execution according to the then-existing laws, which right was as essential a part of the obligation of the contract as if it had been set forth in its stipulations in the very words of the statute relating to judgments and executions. And, where the existing law allowed the sale of defendant's property, to take that right away was to impair the obligation of the plaintiff's contract. But, before that, in the opinion, the court had been very careful to say that this did not apply to all state legislation on existing contracts as repugnant to the constitution, and the court cited as illustrations such acts of the legislature as recording acts under which an elder grantee would be postponed to a younger. Though the effect of such a law is to render the prior deed void as against a subsequent purchaser, it is not a law impairing the obligation of contracts. And so of statutes of limitations and kindred acts. It is said that the validity of such acts cannot be questioned; that the time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergencies which led to those enactments. It is, in my judgment, to this class of legislation that these New York statutes apply, and not the other. The court cites in support of this classification the case of Jackson *v.* Lamphire, 3 Pet. 280, where it was held that a patent of land from the state did not imply that the patentee or his assigns should enjoy the lands free from legislative regulation, but only that the state would not impair the force of the grant; and regulations requiring them to be recorded, containing certain limita-

tions as to time, were held by the court not to impair the obligation, whether the act of the legislature was one of limitations, or a recording act, or a law *sui juris*, called for by the peculiar situation which invoked its enactment.

In Insurance Co. *v.* Cushman, 108 U. S. 51, 65, 2 Sup. Ct. 245, the supreme court says:

"The laws with reference to which parties may be assumed to have contracted were those which in their direct and necessary legal operations controlled or affected the obligations of such contract."

And it was held that a reduction in the interest as between the purchaser at the sale and the party entitled to redeem did not impair the obligation of the contract.

In the case of Ewell *v.* Daggs, 108 U. S. 143, 150, 2 Sup. Ct., 413, it was held that the repeal of a statute of Texas which made contracts void for usury acted retrospectively, and took away the right of the defendant to make the defense of usury, but that such repeal was not legislation impairing the obligation of contracts. Mr. Justice MATTHEWS uses this pertinent language:

"The effect of the usury statute of Texas was to enable the party sued to resist the recovery against him of the interest which he had contracted to pay, and it was in its nature a penal statute, inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not the uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws without a saving clause operated retrospectively, so as to cut off the defense for the future even upon actions upon contracts previously made. And such laws, operating with that effect, have been upheld as against all objections on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. * * * And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a

penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own; and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized by having passed into a complete transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. * * * The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract, —a naked legal right, which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect."

In the case of Gross *v.* Mortgage Co., 108 U. S., 488, 2 Sup. Ct., 947, the above case of Ewell *v.* Daggs, was reaffirmed in its application to statutes which made valid contracts which had previously been invalid on account of their noncompliance with prohibitive acts of the legislature; and it is held that these subsequent statutes were not unconstitutional, as depriving the person of his property without due process of law; and Mr. Justice HARLAN makes this observation in regard to such statutes:

"When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the state, upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a

suit to enforce the lien given by the mortgage, shield himself behind any statutory prohibition of public policy which prevented the mortgagee, at the date of the mortgage, from taking the title, which was intended to be passed as security for the mortgage debt."

Further quoting from a previous case, he remarks:

"It is not easy to perceive how a law which gives validity to a void contract can be said to impair the obligation of that contract."

Nor is it easy to see how a law which restores the stipulations of a valid contract, that have been interrupted by the operation of a statute, can be said to impair the obligation of a contract. Counsel on neither side have cited any case where the question of the impairment of the obligation of a contract in its application to statutes like these of the state of New York, requiring notice to be given before forfeiture of a policy of insurance can be insisted upon, has been considered or determined, and I have found none. But I feel quite sure that the principle enunciated by Mr. Justice Matthews in the case above cited fully applies to such statutes. These parties agreed that the nonpayment of the premium should work a forfeiture. The statute stepped in to relieve against the hardness of that contract, but it created no other or different contract from that which the parties had made. Hence the repeal of the statute only operated to restore the stipulations of the agreement as made between the parties themselves.

It is my opinion that the New York Act of 1892, operated to repeal the Act of 1877, in the matter of statutory regulations concerning notice, and that by the act of 1892, this policy was especially excepted because it is "a term insurance contract for one year." It operated retrospectively, as the act of 1877 did, because by its very

terms it applied to every policy thereafter issued or renewed. The regulations of these two acts as to the notice to be given applied to protect the beneficiaries upon premiums renewed upon policies already existing, as well as to premiums upon policies thereafter issued; and, of course, if the act applies to require notice as to previously existing policies, the later act, exempting these renewals from the requirements of notice, also applies to then-existing policies in its relation to the renewal of premiums. Therefore, when the plaintiff or the life assured did not pay the premiums accruing on the 1st of April, 1893, the 1st of October, 1893, and the 1st of April, 1894, the policy lapsed, and the forfeiture was complete, notwithstanding that no notice was given. Demurrer sustained, and suit dismissed, at plaintiff's costs.

Exhibit B.

No. 695.

United States Circuit Court of Appeals,

SIXTH CIRCUIT.

MARY A. ROSENPLANTER *v.* THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF NEW YORK.	Error to the Circuit Court of the United States for the Western District of Tennessee.

SUBMITTED MAY 11, 1899.
DECIDED OCTOBER 3, 1899.

Before LURTON, Circuit Judge, and CLARK and THOMPSON, District Judges.

This was an action upon a policy of life insurance. The defendant demurred to the declaration. The demurrer was sustained as not stating a good cause of action. From the judgment thereon the plaintiff sued out this writ of error.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the Court.

The declaration shows that the contract of insurance upon which the suit was brought was made April 1, 1889. In consideration of the premium paid and stipulated to be paid, the Insurance Society agreed to pay the plaintiff, Mary A. Rosenplanter, the wife of the insured, Carlos G.

Rosenplanter, the sum of $10,000 within ninety days after acceptance of satisfactory proof of the death of said Carlos G. Rosenplanter, "provided, such death shall occur before twelve o'clock on the first day of April, 1890." The said contract further obligated the society "to renew and extend said insurance upon like conditions during each succeeding year of the life of the insured from the date thereof upon the payment of the annual renewal premiums for the actual age attained by said assured, in accordance with the schedule printed on the next page of said policy for each one thousand dollars insured, except as reduced by the application of the surplus and guaranty fund, such payments to be made in semi-annual equivalents, payable on first day of October and April, respectively, in each succeeding year." But it was further provided in said policy that if "the mortality in this society shall continue as favorable in the future as it has been in the past in the largest and best companies, this insurance will be extended and renewed during the whole expectation or probable lifetime of the within named insured, at the rate of premium charged for the first year only of this policy." It was also a term of the policy that failure to pay when due any semi-annual equivalent "will terminate the policy," and that, "subject to the stipulations regarding payment of premiums," the policy should, if the death occurred two or more years after its date, "be incontestable, except for fraud in obtaining this policy."

The form of the policy is not at all like that construed in Life Insurance Company *v.* Statham, 93 U. S. 24, where it was said: "These policies did assure the life of the party named in a specific amount for the term of his natural life." The policy here involved is an agreement for a policy of insurance from year to year, and the payment of an annual premium only paid for an insurance for a single year. The extension of the policy for a succeed-

ing year depended upon compliance with the terms and conditions in respect of a further premium payment to be made by the insured. "It was," to quote the language of the Court of Appeals of New York in McDougal *v.* The Provident Savings Life Assurance Society, 135 N. Y. 551-553, where a policy in essentials much the same was involved, "a contract for an insurance for the term of one year only, providing, however, by its terms, for its renewal for successive years upon compliance by the assured with the conditions named." Nevertheless, the terms upon which it might be renewed by the payment for succeeding years of the same rate of insurance charged for the first year only, notwithstanding the higher rate chargeable for the greater age of the insured, and the growing interest of the assured in the surplus premiums paid by him which go to form a reserve or accumulated fund operating to reduce subsequent premiums, gave to the insured an interest in the contract beyond the mere insurance for the term of a current year. We shall, therefore, assume that this contract was within the meaning and protection of Chapter 321 of the New York Laws of 1877. McDougall *v.* The Prov. Savings Life Ass. Society, 64 Hun, 515. That statute was in force when this policy issued. Among other things it provided that:

"No life insurance company doing business in this state shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on said policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured."

Omitting the description of the part of the notice for the payment of an unpaid premium, and declaring a forfeiture if the notice is not complied with, the final proviso reads:

"Provided, however, that if a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

The contract in question is a New York contract and specifically provides that "at all times and places" it "shall be construed to be a contract made in the city of New York."

The declaration avers that the insured paid the semi-annual premium for April 1, 1889, and the semi-annual premium due October 1, 1889, and the semi-annual premium due April 1, 1890, and the semi-annual premium due October 1, 1890, and the semi-annual premium due April 1, 1891, but that he did not pay the semi-annual premium due October 1, 1891, or the semi-annual premium due April 1, 1892, or the semi-annual premium due April 1, 1893, or the semi-annual premium due October 1, 1893, or the semi-annual premium due April 1, 1894, and that the insured died September 5, 1894, leaving six semi-annual premiums due and unpaid. The averment of the declaration is, that notwithstanding the non-payment of said last six semi-annual premiums, the policy was in force at the death of the insured by force of the said New York statute of 1877. The further averment is, that the said Insurance Society "did mail the notice required by the said statute on the first day of September, 1891, to the insured," of the semi-annual premiums due and payable Oct. 1, 1891, but that said notice was mailed only twenty-

nine days prior to October 1, 1891, and not at least thirty days prior to the maturity of a premium as required by the said statute, and that no other notice in respect to that premium, nor any of those which subsequently accrued, was ever given or mailed. In consequence of this non-compliance with the said statute, it is contended that the said policy was in full force and effect at the date of the death of the insured.

The learned judge who presided in the circuit court yielded to the authority of the case of Hicks *v.* National Life Insurance Company, 60 F. R., 690; and reported as Rae's Executors *v.* National Life Ins. Co., 20 U. S. App., 410; decided by the United States Circuit Court of Appeals for the Second Circuit, and held, that the day upon which this notice was mailed should be excluded in the computation of time, and hence that it had not been mailed thirty days prior to the day when the premium due October 1, 1891, fell due, and that the society was in no better position than it would be if no notice had been mailed. The opinion of the Second Circuit Court of Appeals is based upon the decisions of the courts of New York, and involved the construction of the same New York statute here under consideration. Accepting this opinion as an authoritative interpretation of the law of New York, we concur in holding, that the notice given was not the notice required by that law and was ineffectual to terminate the contract under the provisions in respect to the forfeiture or lapsing of New York contracts of insurance made subject to the provisions of the act of 1877. The notice required by the act of 1877 might be either a notice of the time when a premium would fall due, or of a default in the payment of a premium. If given before default, the requirement is that the notice shall be mailed "at least thirty and not more than sixty days prior to the day when the premium is payable." If given after

a default has been made, the requirement is equally specific that it shall be a notice that a premium is due and unpaid and that if not paid within thirty days "after the mailing" of such notice the "policy and all payments thereon will become forfeited and void." The same section also provides that, "in case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice."

The notice given before the premium fell due was insufficient and no notice whatever was given after the nonpayment of that premium. The effect of the prohibition against declaring a forfeiture of the interest of the assured under the contract was to keep the policy alive as a valid subsisting insurance, notwithstanding the stipulations of the parties to the contrary. The duration of the policy, so long as it was dominated by the statute, was not dependent upon the payment of premiums on the day named therein, but upon payment within thirty days after the statutory notice should be given. The only way in which the policy could be terminated under the statute was by the failure of the insured to pay his premium upon notice "mailed" thirty days before the premium was due or by a notice of default and demand for payment within thirty days after mailing such notice. Baxter *v.* Brooklyn Life Ins. Co., 119 N. Y., 450-455.

But for the subsequent act of May 18, 1892, there could be no serious doubt that this policy was in force at the date of the death of the insured, no effectual statutory notice having been given.

Chapter 690 of the Revision of the Statutory Laws of New York, approved May 18, 1892, is a general act revising the whole law of the State of New York in respect of insurance corporations, and expressly repeals all of Chapter 321 of the Act of 1877.

By Section 92 of that act it is provided:

"SEC. 92. No forfeiture of policy without notice.—No life insurance corporation doing business in this State shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

"The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as the right to a surrender value or paid-up policy as in this chapter provided.

"If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice.

"The affidavit of any officer, clerk or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that svch notice has been duly given."

Section 291 of this act provides that no right acquired or accrued, or penalty or forfeiture incurred, prior to October 1, 1892, should be affected by the repeal of the laws theretofore in force, but otherwise manifestly subjects policies then in force to the Act of 1892, in respect of payment of premiums thereafter falling due.

This Act of 1892 excepts from its terms policies which are "term insurance contracts for one year or less." The policy in suit is, as we have endeavored to show, a term insurance contract for one year and therefore falls within the exception of the section. McDougal v. Prov., etc,, Society, 135 N. Y. 551–556. Baldwin v. Prov., etc., Society, 48 N. Y. Supp. 463.

At least three semi-annual premiums, fell due after the passage of this Act of 1892. If this act did not require that notice should be given prior to the falling due of any premium, or notice of any default in payment, as did the act of 1877, then no notice was necessary, except such notice as the contract itself requires.

In the case of Baldwin v. Provident Savings Life Assurance Society of New York, *supra*, there was involved a policy issued in 1885. It was kept alive by payments of premiums until January, 1895. A call for a premium due February 9, 1895, was sent out. The assured died February 19, 1895, without having paid the premium thus called. It was, among other things, contended by the counsel for the beneficiary that this notice was not a sufficient compliance with the terms of this act of 1892, the act in force when the premium fell due. To this the court replied by saying :

"The policy, however, falls within the exception of the section; that is, it is either a policy issued upon the payment of a monthly premium, or it is a term insurance contract for a year or less, in which case no notice is necessary; and in this view we are sustained by the decision of the Court of Appeals in McDougall v. Provident Savings Life Assurance Society (135 N. Y. 551, 556). Judgment should be entered for the defendant."

It is not a question as to whether this policy was "one issued or renewed" after the passage of the act of 1892. It had been kept alive by force of the act of 1877 so long as that statute regulated the subject of forfeitures and notices. When the act of 1877 was repealed by the act of 1892, the whole subject was thereafter regulated only by the latter act. If it did not prescribe some notice in respect to the forfeiture of policies for the term of one year, the only notice which the insured could demand in respect of premiums which should fall due thereafter would be such notices as the contract itself prescribed or which had otherwise become a term of the agreement between the parties. In this view of the case the policy lapsed by reason of the non-payment of the premiums which fell due after the passage of the act of 1892, notwithstanding no notice was given.

But the very zealous and learned counsel for the beneficiary have very strongly urged that as this contract was made while the act of 1877 was in force, the provisions of that act became so incorporated into the contract as to become a part of the contract itself, and that the provisions of the act of 1877, prohibiting a forfeiture of the interest of the insured in the policy without a notice according to the terms and conditions of the statute, became as much a term and stipulation of the policy as if inserted therein by the parties themselves. Upon this assumption, they insist, that the act of 1877 could not be altered, or amended, or repealed, so as to subject the contract to

forfeiture without the statutory notice, as such repeal or amendment would impair the obligation of the contract.

To this we cannot agree. The contract which the parties themselves made was one for an insurance for a single year, with the privilege of renewal for succeeding years upon condition of the payment of an additional premium upon the day named in the policy. Failure to renew it according to the condition of the contract put an end to the policy without more ado. So with respect to the payment of the second half of the yearly premium; if not paid when due, the contract was thereby terminated. The act of 1877 interposed and for the benefit of the insured provided, that the stipulations of the contract in respect to the termination of the policy should not be enforced unless notice of a certain character had previously been given by the insurer. The statute did not provide that the interest of the insured shall not be forfeited upon failure to renew the policy by the payment of the stipulated premium, but that the forfeiture should not be declared or be effective unless the default in the payment of the stipulated premium should occur after a particular notice had been given prior to the stipulated day of payment, or a default should continue after a particular notice and demand for payment had been given. Thus the law stepped in and in effect said: "You shall not enforce the stipulations into which you have entered in respect to the effect of a default in payment of premiums unless you first comply with this statute by giving the notice herein required." The subsequent repeal of this statute does not impair the obligation of the contract in respect to premiums which should mature thereafter. The repeal simply permits the contract into which the parties had entered to be enforced according to its own terms and conditions.

"The laws with reference to which the parties must be

assumed to have contracted . . . . were those which in their direct or necessary legal operation controlled or affected the obligations of such contract." Conn. Life Ins. Co. v. Cushman, 108 U. S., 51–65.

Laws repealing laws which prevent the operation of contracts otherwise within the competency of the parties, and permit their enforcement according to their terms, have never been regarded as laws impairing the obligation of contracts or as an impairment of vested rights. Conn. Life Ins. Co. v. Cushman, 108 U. S., 51–65; Ewell v. Daggs, 108 U. S., 143; Gross v. United States Mortgage Co., 108 U. S., 477; Butler v. United States B. & L. Ass., 97 Tenn., 679; Curtis v. Leavitt, 15 N. Y., 15, 85; Lewis v. McElvain, 16 Ohio. 347; Trustees v. McCaughy, 2 Ohio St., 152; Cooley Const. Lim., side pages 293–378.

Judge Hammond, who heard this case below, very admirably answered the argument that the act of 1877 so entered into the contract as to make its repeal an impairment of its obligations, by saying :

"If the provisions of the statute as to notice had been written in the policy as agreements of the parties, that would have been their contract, and of course the law could not make another contract for them. Wherefore, it would be enforced by the courts as the agreement of the parties; but the statute did not undertake to make a contract of insurance for the parties. It was only a statutory regulation for the government of insurance companies, compelling them to give notice as required by the act of the non-payment of premiums before they would be allowed to declare a policy forfeited according to its stipulations. It was a regulation that the legislature had a right to make. It was a beneficent regulation for the relief against a forfeiture created under the contract which it was entirely competent for the legislature to withdraw, alter or amend, as to it might seem best.

Surely, if we turn the principle contended for the other way, its operation would be denied by the plaintiff and her counsel. That is to say, if an insurance company

should contend that at the time of the passage of the act it had already issued a policy defining the terms of forfeiture, and that it was not within the power of the legislature to impair the obligation of that contract by importing into it a different stipulation or provision as to the conditions of forfeiture, the beneficiaries would deny that such legislation unconstitutionally impaired the obligation; but if the legislature has the power to import into an existing contract such a regulation for giving notice without impairing the obligation of the contract as to the insurance company, it has the right to take it away by repeal, without impairing the obligation as to the beneficiary."

In Gross v. Mortgage Company, 108 U. S. 477-488, the validity of a mortgage was involved which had been made at a time when the mortgage was invalid under the existing local law but which was subsequently validated. The validating act was said to be repugnant to the Constitution of the United States as impairing the obligation of the contract. To this the court said:

"That the act in question is not repugnant to the Constitution, as impairing the obligation of a contract, is, in view of the settled doctrines of this court, entirely clear. Its original invalidity was placed by the court below upon the ground that the statutes and public policy of Illinois forbade a foreign corporation from taking a mortgage upon real property in that state to secure a loan of money. Whether that inhibition should be withdrawn was, so far at least as the immediate parties to the contract were concerned, a question of policy rather than of constitutional power. When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the state, upon the execution of a contract like this, it can not be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a suit to enforce the lien given by the mortgage, shield himself

behind any statutory prohibition or public policy which prevented the mortgagee, at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt. We repeat here what was said in Satterlee v. Matthewson, 2 Pet. 380, and, in substance, in Watson v. Mercer, 8 Pet. 88, that 'it is not easy to perceive how a law, which gives validity to a void contract, can be said to impair the obligation of that contract.'"

In Ewell v. Daggs, 108 U. S. 143-151, a statute which declared all contracts voidable for usury was repealed. It was held that the repeal of the statute deprived the debtor of the statutory defense, and was valid as not impairing the obligation of the contract. Touching the objection to the repeal of such statutes as depriving existing contracts of a statutory defense, the court said :

"Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contracts is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives under such circumstances, as long as it remains *in fieri*, and not realized by having passed into completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere to the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. Read v. Plattsmouth, 107 U. S. 568; and see Lewis v. McElvain, 16 Ohio, 347; Johnson v. Bentley, Ib. 97; Trustees v. McCaughy, 2 Ohio State, 152; Satterlee v. Matthewson, 16 S. & R. 169; S. C. in error; 2 Pet. 380; Watson v. Mercer, 8 Pet. 88. The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to in-

sist upon, and which no constitutional provision was ever designed to protect. Cooley Constitutional Limitations, 378, and cases cited."

There was no error in sustaining the demurrer to the plaintiff's declaration, and the judgment is accordingly affirmed.

Exhibit C.

IN THE CIRCUIT COURT OF THE UNITED STATES

DISTRICT OF WASHINGTON—NORTHERN DIVISION.

CAROLINE L. HATHAWAY and HORACE C. HATHAWAY, a minor,
Plaintiffs,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation,
Defendant.

Opinion.
Filed Jan. 22, 1900.

GEORGE H. DURHAM,
R. W. EMMONS,
V. H. FABEN,
For Plaintiffs.

STRUVE, ALLEN,
HUGHES & MCMICKEN,
For Defendant.

HANFORD, District Judge:

This is an action by the beneficiaries named in a life insurance policy issued by the defendant. By a written stipulation, a jury was waived and the case had been tried and submitted upon the pleadings, evidence and arguments, and upon due consideration I find that the policy was issued by the defendant at its office in the

city of New York on the 26th day of January, 1892, insuring the life of Homer M. Hathaway of Pomeroy, in this State, for the sum of $3,000, in favor of his wife and son, who are the plaintiffs in this action. The contract is a New York contract, to be performed in the State of New York, and as to all the rights and liabilities of the parties, the law of the State of New York must govern. The policy declares that, The Mutual Life Insurance Company of New York, will pay at its home office in the City of New York unto Caroline L. Hathaway and Horace C. Hathaway, son of Homer M. Hathaway, their executors, administrators or assigns, Three thousand Dollars, upon acceptance of satisfactory proofs at its home office of the death of said Homer M. Hathaway, during the continuance of the policy, upon specified conditions, and subject to the provisions, requirements and benefits stated on the back of the policy.

The annual premium of one hundred and thirteen dollars and ten cents was required to be paid on the delivery of the policy, and thereafter to the company, at its home office in the City of New York, on the 26th day of January of every year during the continuance of the contract, until premiums for twenty full years should be fully paid to said company.

This contract is not an assurance for a single year with a provision for renewal from year to year by paying the annual premiums, but it is the kind of a policy which the Supreme Court of the United States in the case of New York Life Insurance Co. *v.* Statham *et al.*, 93 U. S., 24-37, declared to be "an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums". When the contract was made a statute of New York, viz: Chapter 321 of the Laws of New York for the year 1877, prescribed that no life insurance company doing

business in the State of New York should have power to declare forfeited or lapsed any policy thereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, unless a prescribed notice should first be given in a prescribed manner, and that payment made within the time limited by such notice should be taken to be in full compliance with the requirements of the policy in respect to the payment of the premium or interest, notwithstanding any contrary stipulation contained in the policy ; and further providing that "No such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice". In the year 1892 there was a complete revision of the insurance law of the State of New York, and the new statute contained a substitute for the section in the law of 1877, prescribing the notice to be given as a pre-requisite to the forfeiture of a policy for non-payment of premiums. That section of the law of 1892, is by its terms applicable only to policies subsequently issued or renewed. By another section, chapter 321 of the laws of 1877, is declared to be repealed ; another section contains the following saving clause :

"The repeal of a law or any part of it specified in the annexed schedule, shall not affect or impair any act done, or right accruing, accrued or acquired, or penalty, forfeiture or punishment incurred prior to Oct. 1, 1892, under or by virtue of the laws so repealed, but the same shall be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such laws had not been repealed."

Another section provides that the provisions of the new laws as far as they are substantially the same as the laws existing on Sept. 30, 1892, shall be construed as a continuation of such laws, modified or amended according to the language employed, and not as new enactments.

It is my opinion that the rights of the parties under the policy of insurance in suit were not affected or changed by the new legislation of 1892. Conceding that the statute of 1877 prescribing the notice to be given was repealed, still there was no interval of time intervening after the repeal of that law, and before the substituted section became effective within which the insurance company could have claimed a forfeiture of the policy for non-payment of the premium, and under the law of 1892 the policy could not be forfeited for non-payment of the premium until thirty days after the mailing of the prescribed notice. In the vear 1897, the law was again amended and Section 92 of the law of 1892 which saves life insurance policies from forfeiture for non-payment of premiums, unless the prescribed notice shall have been given, was reenacted, but with such a change of phraseology as to change the effect so as to only save policies from forfeiture for a period of one year after a premium has been due and unpaid, and with an additional provision barring actions on policies after the lapse of one year from the date of a default in the payment of any premium.

No premiums on the policy in suit have ever been paid, except the first annual premium which was paid at the time the policy was delivered, and the statutory notice was never given. Under the statutes of New York, in force prior to the 8th day of April, 1897, the policy was kept alive, notwithstanding the non-payment of the premium by the mere failure of the insurance company to proceed in the manner prescribed by the statute, to declare a forfeiture. The sole question to be decided in the case, is whether the amendment of the law of 1892 by the act of 1897, had the effect to terminate the contract between the parties immediately, and to bar an action upon the policy after the death of the insured, which occurred subsequent to the date of said statute.

The plaintiffs make strenuous objections to consideration of the statute of 1897, on the ground that the same has not been pleaded, but I consider the objections to be without merit, for two reasons. In the first place, this is a court of the United States, and it is required to have judicial knowledge of the general laws of the different states, which affect the rights of litigants. The defendant issued the policy in suit for the gain expected by receipt of the annual premiums to be paid by the insured; by failure to pay the premiums and by the express provisions of the contract, the defendant would be absolved from liability, but for the statute laws of the State of New York, and this Court cannot enforce a right based entirely upon the New York statutes and at the same time ignore those statutes. In the second place, the statutes of 1877 and 1892, upon which the plaintiffs rely, were not pleaded by the plaintiffs in their complaint, but are set up as affirmative matter in their reply. Now, by pleading those statutes in the reply, the plaintiffs have tendered an issue which, according to the practice under the Code, cannot, be met by further pleading on the part of the defendant, except by a demurrer; but an issue of fact arises, and the defendant may controvert the allegations or avoid the effect thereof according to the truth, either by showing that the statutes which the plaintiffs have pleaded in their reply never existed, or that they have been repealed or amended without filing any rejoinder to the reply.

The act of 1897 permits life insurance companies doing business in the State of New York to forfeit their policies for non-payment of the premiums, and without giving the prescribed notice, but only after the lapse of one year from the date on which the unpaid premiums become due and payable, and bars an action upon a forfeited policy unless it be commenced within one year from the date of de-

fault in the payment of the premium for which the forfeiture is claimed. There is no express declaration in the statute making it applicable to policies which were issued prior to the amendment, and there is nothing to indicate an intention of the Legislature to make the new law retroactive; on the contrary, the statute refers to "any policy hereafter issued or renewed." The questions involved in the decision of this Court and of the Circuit Court of Appeals for the 9th Circuit, in the case of Phinney *v.* Insurance Co., 67 Fed. Rep., 493; Equitable Life Assurance Society *v.* Trimble, 83 Fed. Rep., 85; New York Life Insurance Co. *v.* Dingley, 93 Fed. Rep., 153, and Mutual Life Insurance Co. *v.* Hill, 97 Fed. Rep., 263, are entirely different from the main question decided in the case of Rosenplanter *v.* Provident S. L. A. Society, 91 Fed. Rep., 728, S. C., 96 Fed. Rep., 721. I feel entirely free to concur in the opinions in the latter case, and I assent to the general proposition that, existing rights which do not rest upon agreements of the parties nor upon any consideration of value received, but only hang upon arbitrary provisions of paternal statutes, may be cut off at any time by act of the Legislature which created them without impairing the obligations of contracts. But to cut off existing rights the act must contain explicit declarations of its purpose to cut them off or its provisions must necessarily cut them, as would be the case where the statute upon which they depend is repealed, without a saving clause. The courts will not presume that a new statute was intended to cut off any existing right when there is no express declaration of such intention, for the reason that it is contrary to the policy of our government to construe statutes so as to make them operate retroactively. In the Rosenplanter case the policy under consideration was a term policy, and expired by its own limitations, unless it

was renewed by the omission of the Insurance Co. to proceed according to the provisions of the act of 1877, to effect its forfeiture. It was not kept alive by the statute of 1892, because it belonged to the excepted class, and it was not protected by the act of 1877 after the repeal of that act. The policy in suit was not issued or renewed after the statute of 1897 was passed, and, therefore, it does not come within the purview of that statute, as it is not a policy which had to be renewed periodically in order to keep it alive there was not even a constructive renewal of it, by force of the statute against forfeiture.

I direct that findings be made in accordance with this opinion, and a judgment will be entered thereon in favor of the plaintiffs for the amount of the policy, with interest, after deducting all unpaid premiums with interest, to be computed at the New York rate.

Exhibit D.

SUPREME COURT,

KINGS COUNTY.

PHILIP SCHUELL,
Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.

Decision.

The above-entitled action having been tried before me at a Special Term (Trials) of this Court, held at the County Court House, in the City of New York, Borough or Brooklyn, County of Kings, on November 27th, 1899.

After hearing the proofs and allegations of the respective parties, I now make and file the following decision, stating concisely the grounds upon which the issues have been decided herein.

I find that on the 12th day of March, 1896, the defendant issued its policy for $10,000 by which it insured James Thomas Lentzy and agreed to pay Grace and Katrice Lentzy on the death of the assured, the sum of $10,000.

The premiums due on the 12th day of March, 1896, and 1897, were paid. The premiums payable on the 12th March, 1898, were not paid. The statutory premium notice was duly mailed to the assured, James T. Lentzy, on the 9th day of February, 1898, thirty days before March 12th, the day on which the premium was payable.

On the 13th of January, 1899, Lentzy died.

This action was commenced on the 5th day of June, 1899.

I further decide that the premium notice mailed to James T. Lentzy by the defendant on February 9th, 1898, was a compliance with Chapter 218 of the Laws of 1897, the provisions of which controlled this policy at all times subsequently to April 8th, 1897, the date of the passage of said Act, and that failure to pay the premium due and payable on March 12th, 1898, worked a forfeiture of the policy.

And I further decide that the statutory premium notice provided for in the said Law of 1897 need not be given after the due date of the premium named in the policy.

And I further decide that the amendment of Chapter 690 of the Laws of 1892 by Chapter 218 of the Laws of 1897 did not give the assured one year after March 12th, 1898, the date of default in the payment of the premium, within which to make such payment.

And I therefore decide that the complaint of the plaintiff should be dismissed upon the merits, and direct judgment accordingly for the defendant, with costs.

Dated New York, Feb. 15th, 1900.

MARTIN J. KEOGH,
J. S. C.

A copy,
PETER B. HUBERTY,
[SEAL.] Clerk.

Exhibit E.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,

IN AND FOR THE COUNTY OF LOS ANGELES.

FLORA B. ROSSON,
Plaintiff,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant.

Opinion.

The complaint shows that Roland L. Rosson, on February 3, 1898, applied to an agent of the defendant at Los Angeles for life insurance in defendant corporation, which insurance was to be made payable to the plaintiff, his wife. The written application is set out in the complaint is dated February 3, 1898, and provided that the application and the policy thereby applied for, taken together, shall constitute the contract between the parties, and "that this contract shall not take effect until the first premium has been paid during my good health." The application was sent to defendant's home office in New York by the agent. The defendant accepted the application, and on February 21, 1898, a policy in the sum of $10,000, wherein plaintiff was named as beneficiary, was signed in New York by the proper officers of defendant, and then and there mailed by them to the agent at Los Angeles.

On March 12, 1898, at Los Angeles, the agent delivered the policy to Rosson who then and there paid to the agent

the sum of $46. The policy applied for and delivered was what is called by defendant, "a yearly renewable term policy," and provided for an annually increasing premium on the basis of a table of rates printed on the policy. But at the request of Rosson it was provided in this policy "that in lieu of premiums payable annually as provided in said policy, there shall be substituted premiums payable quarterly on the third days of February, May, August and November of each year, the quarterly premiums for the year from February 3, 1898, to February 3, 1899, being forty-six dollars, increasing on the last-mentioned date and annually thereafter on the basis of the table of rates printed on the reverse of this sheet. * * * That the insurance year upon the said policy shall commence on the third day of February." No further payments for or on account of premiums were ever made. But on May 12, 1898, Rosson died at Los Angeles.

The complaint also sets out the present statute law of New York, which provides that life insurance companies doing business in that State shall not, within one year after default in payment of a premium, declare forfeited or lapsed, an insurance policy unless a notice of described contents shall, within specified times, "have been duly addressed and mailed to the person whose life is insured at his or her last known post office address in this State," etc. The complaint then alleges that a notice, which is set out in full, was mailed in New York on April 15, 1898, to Rosson, at Los Angeles; and further alleges that no other or different notice was ever mailed or given to Rosson by defendant. The complaint contains also allegations relating to the manner of filling out the application, as to the post office address of Rosson, etc.

Defendant has moved that these allegations relating to the statutes of New York, and to the manner of filling out the application, etc., be stricken out on the ground that

same are irrelevant. Defendant has also demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

If the provisions of the New York statutes relate as well to the policy holders who do not reside and who have no postoffice address in that State as to resident policyholders, then the motion to strike out should be denied. But if the statute relates only to policyholders who are residents of, and who have a post office address in New York, then the motion should be granted.

I think the motion should be granted.

Under the circumstances of this case, the final acts of the execution of the contract of insurance were done in California. The policy was delivered and the first premium was paid here. The contract did not take effect until the first premium was paid. Such being the facts, and the application having been made here, it must be held that the contract made in this case is a California and not a New York contract.

Equitable Life Society *v.* Clements, 140 U. S., 226.
Curtis *v.* Aetna Ins. Co., 90 Cal., 245.
Cravens *vs.* New York Life, 50 S. W., 519.
Hicks *v.* National Life Ins. Co., 60 Fed., 690.
Equitable Life *v.* Wenning, 58 Fed., 541.
Insurance Co. *v.* Elliott, 5 Fed., 225.
Horton *v.* New York Life, 52 S. W., 356.
Stevens *v.* Fertilizer Co., 41 Atl., 116.
Ivey *v.* Kern Co., L. Co., 115 Cal., 201.
Yore *v.* Bankers Ass'n, 88 Cal., 609.

The rule to be derived from these cases is that the acceptance of an application and the signing of a policy in one State amounts to but a partial execution of the contract in such State, when, as in the case at bar, the policy,

after being signed, is mailed to an agent, of the insurer in another State there to be delivered to the assured, and not to be in effect until the first premium has been paid during his good health. Payment of the premium during the good health of the assured, and delivery of the contract to him, are conditions precedent to and are the final acts in the execution of the contract. Hence, it must be held here that this contract was made at Los Angeles, California, and took effect on March 12, 1898, the day that the first premium was paid and the policy delivered.

It appearing from the complaint that the assured resided at Los Angeles at all of the times above mentioned until his death; that he had no post-office address in the State of New York, it must follow, from a reasonable construction of the New York statute, that the defendant was not required to give to the assured the notice required by that statute in order to claim a forfeiture of the policy for a non-payment of premium.

As authority for the proposition that the above-mentioned N. Y. Statute is applicable to this case, plaintiff's counsel refers to Griffith *v.* Life Insurance Co. (101 Cal., 640). Since that decision was rendered the statute of New York has been amended. It did not then provide, as it does now, that the notice shall be mailed to the insured "at his or her last known post-office address in this State." The phrase "*in this State*," was inserted by amendment of the statute in 1897. And though the statute may be construed as "a limitation on the power" of a New York Life insurance company to declare forfeitures, still, under the amendment, that limitation relates to policy-holders having post-office addresses in that State.

The cases of Equitable Life, etc., *v.* Nixon and Trimble (81 Fed., 796, and 83 Fed., 85), are also cited to sustain the contention that the contract made in this case is a New York contract, and that the statutes of that State

are applicable. But these decisions, also, are based upon the statute as it stood before the amendment. In each of these cases the premium accompanied the application, and, in each case, the contract of assurance was complete, and the insurance in force, when the application and the premium were accepted, and the policy signed in New York.

But there is another matter which fixes the place of contract at Los Angeles. The application states that the quarterly premiums for the first year should be $45.95. The policy fixed it $46.00. The policy delivered at Los Angeles differed, in this respect, from the application. Therefore, this policy had to be accepted by the assured. This was done at Los Angeles. For this reason alone, it could not be contended successfully that the contract was executed in New York.

The statute provides that no life insurance corporation doing business in New York shall declare any policy lapsed or forfeited by reason of non-payment when due of any premium, unless a written or printed notice stating, etc., "shall have been duly addressed and mailed to the person whose life is insured * * * at his or her last known post office address *in this State* * * * at least fifteen and not more than forty-five days prior to the day when the same is payable * * * and no policy shall in any case be forfeited * * * * * * * until the expiration of such notice." It must be epparent that this provision was intended by the legislature of New York for the benefit of policy-holders residing and having a post office address in that State. Counsel for defendant have thoroughly briefed the questions to be considered in the proper construction of this statute. But it seems to me that the provisions of the statute itself clearly indicate that its benefits were intended for residents of New York; that the legislature was enacting a law for the benefit of

persons within its jurisdiction. The authorities cited fully sustain this conclsuion, and no discussion of them seems necessary. They are:

Sutherland, Stat. Construction, Secs. 218, 238.
Burr *v.* Dana, 22 Cal., 11.
DcDougal *v.* Provident Life Ass'n., 135 N. Y., 556.
Merrill *v.* Railroad, 63 N. H., 259.
Whitford *v.* Panama R. R. Co., 23 N.Y., 465.
State *v.* Fire Ins. Co., 51 S. W., 635.
Queen *v.* Lightfoot, 6 Ell. & Bl., 822.
Bishop on Written Laws, Sec. 141.
Needham *v.* Grand Trunk R. R. Co., 38 Vt., 307.
State *v.* P. & C. R. R. Co., 45 Mo., 41.
South Yuba Dam *v.* Rosa, 80 Cal., 333.
Felton *v.* West, 102 Cal., 266.

Holding, as I do, that the above mentioned provisions of the law of New York do not apply to policy holders in defendant corporation, who reside and have their post office addresses in this State, the motion to strike out parts of the complaint must be granted.

December 28, 1899.

D. K. TRASK,
Judge.

(Endorsed): 32673—Rasson *v.* Equitable Life Ass'n. Soc.—Opinion filed Dec. 29, 1899.—C. W. Bell, Clerk, by A. M. McPherron, Deputy.